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McMASTER'S COMMERCIAL DECISIONS

AFFECTING THE

BANKER AND MERCHANT

FROM THE

DECISIONS OF THE HIGHEST COURTS OF THE SEVERAL STATES

FOUNDED BY

J. S. McMASTER

Formerly Examiner New York State Bank Department

VOL. XV.

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INDEX.

ACCORD AND SATISFACTION:

An accord without a satisfaction is no bar to an action on the original demand; a new undertaking, with new consideration accepted, is an accord and satisfaction good without performance. Page 1a, No. 1389.

Check of defendant stating on face that it was in full payment, cashed by plaintiff, held to be accord and satisfaction, though plaintiff notified defendant of its receipt and credit, but disclaimed settlement. Page 2a, No. 1390.

Loss having been sustained under a hail policy, the insurer claimed it was adjusted at $400, and the insured at $925. The company sent assured a check, which, with the balance due for premium, amounted to $400, reciting on its face, "This check accepted as payment in full for all claims to date." The assured cashed the check at his local bank, and in doing so wrote his name under an indorsement "Accepted in part payment of loss by payee." Held that, since there was no consideration for the acceptance and cashing of the check, it would not amount to an accord and satisfaction; Civ. Code, section 1180, providing that part performance of an obligation, when expressly accepted by the creditor in writing as satisfaction thereof without any new consideration, extinguishes the obligation, being inapplicable. Page 43a, No. 1414.

Whether a buyer, at the time of sending a check on which was written "in full to date," and whether the seller, on receiving and depositing the check, understood, or ought to have understood, as reasonable men, that the check was in accord and satisfaction of all outstanding claims between them, or whether the seller, on receiving the check, had a right to believe that it was sent in payment of a reduced bill for specified goods amounting to the exact amount of the check, held for the jury.

ACCORD AND SATISFACTION — Con.

The acceptance and collection of a check, proffered on condition that it is in full settlement of all unliquidated claims, though accompanied by protestations that it is not so received, bars any attempt to collect the balance, and constitutes an accord and satisfaction.

Where plaintiff received defendant's check, on which was written the words "in full to date," plaintiff's erasure of such words before depositing the check was unauthorized, and did not affect the question whether its proffer and acceptance constituted an accord and satisfaction.

The acceptance and deposit of a check, on which is written the words "in full to date," or an equivalent phrase, does not constitute an accord and satisfaction of a controverted claim as a matter of law. Page 44a, No. 1415.

The rule that, where the amount of a debt is undisputed, the receipt of a less sum to discharge the entire debt, is not a satisfaction, because the agreement is without consideration, followed and applied.

It is not a consideration for an agreement to accept a less sum in satisfaction of the whole amount due on a promissory note that the maker agrees after maturity of the note to pay such lesser sum at a place other than that specified in the note.

An agreement by certain joint makers of a note to procure one of their number, though insolvent, to contribute his proportionate share of the note, and to furnish him money to make the payment, is not a consideration for an agreement by the payee to accept a less sum in satisfaction of the amount due on the note.

An allegation that one defendant had a dispute and a counterclaim to the demand against him, is insufficient to constitute a consideration for an agreement to accept a less sum in payment of the amount due. Page 149a, No. 1477.

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ALTERATION OF INSTRUMENTS:

In absence of notice to the payee, a material alteration of the capacity in which one of the makers signed would not effect the liability of the other indorsers or makers.

The alteration of an instrument by one of the obligors before delivery for the purpose of expressing the real intention of the parties does not avoid the contract. Page 124a, No. 1463.

ALTERATION OF INSTRUMENTS — BILLS AND NOTES:

Where the name of one of several signers of a note was erased before delivery by drawing marks through his name, the effect of the erasure was to take such name off the note, to the same extent as if it had never been signed thereto. Page 53a, No. 1421.

BANKS AND BANKING:

W., being indebted to R., whose place of business W. knew to be 48 Walker street, New York city, drew a check on his local bank of deposit in favor of R. for the amount of the debt, without designating therein his place of business, and enclosed the check with a letter in an envelope which he, through mistake, addressed to R., 48 Walker street, *Cleveland, Ohio*, and caused the envelope and contents so addressed to be mailed in the usual way, and it arrived in Cleveland in due course of mail, where the letter carrier found no one of that name on Walker street of that city, but found a man whose name was R. on Henry street, and to whom the carrier delivered the letter. He opened it and took possession of the check, and by indorsing the name R. on the back thereof obtained the cash from an acquaintance, who indorsed and deposited said check in his bank of deposit in Cleveland. The latter bank indorsed it over to another bank in the same city, guaranteeing prior indorsements, and this bank indorsed it payable to any bank or bearer, guaranteeing it all prior indorsements, and in this condition it was presented to the drawee bank, and by it paid and charged to W.'s account, it having no knowledge of said mistake in addressing the letter. W. afterwards charged his debt to the New York creditor by other means, and brings suit against the drawee bank to recover the amount of the check so charged to his account.

BANKS AND BANKING — Continued.

Held, the drawer of the check was first in fault, and as his negligence contributed directly to its wrongful and fraudulent appropriation, he is not entitled to recover. Page 47a, No. 1417.

Where defendant purchased a claim against a bank to which he was indebted, and the bank passed into the hands of a receiver, the assignment of the claim did not give defendant the right to have the same applied on his note to the bank pending the receivership; but the bank having resumed business, and the deposit having remained intact, defendant was then entitled to have the assigned deposit credited against his indebtedness, subject to the bank's right to deduct therefrom any debt owing to it by the assignor.

Where a bank depositor assigned his claim to defendant, who claimed the right to offset it against his indebtedness to the bank, which also claimed the right to offset an alleged indebtedness against the assignor, the burden was on the bank to prove the amount of the assignor's indebtedness. Page 91a, No. 1445.

Plaintiff deposited to his account a check drawn upon a bank in another State, indorsing it to the order of the bank, and it was entered on a deposit slip on which was the printed statement, "All items credited subject to final payment," and sent the note to its correspondent bank for collection. It was collected by that bank, but the proceeds were not paid over and the correspondent bank became insolvent, on which the depositor's bank charged it back against plaintiff's account. There was no evidence as to any want of diligence or due care in the selection of the correspondent bank. Held, in an action by the depositor to recover the amount of the check, that the bank was entitled to a directed verdict. Page 143a, No. 1472.

One W. accompanied a stranger to the office of M., and introduced him as G. T., who wanted to procure a loan of money. The stranger asked to borrow $3,000, as the owner of a farm, on which he would give a mortgage to secure the loan. M. caused notes and a mortgage to be drawn, which, being executed by the stranger under the name of G. T., were delivered to M. Thereupon M. delivered a check on a nearby bank.

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BANKS AND BANKING — Continued.
The check was presented by the stranger, to whom it had been given, indorsed by that person and by W., to the bank and by it was paid, relying upon the identification by W. The person who received the money was not the owner of the land, but an impostor. Held that, although M. was mistaken and deceived, yet, inasmuch as the person he dealt with was the person intended by him as the payee of the check and the identical person to whom the bank paid it, he cannot recover his loss from the bank. Page 139a, No. 1469.

BANKS AND BANKING — CASHIER:
A cashier of a bank cannot delegate to an officer of another bank authority to accept drafts in such cashier's name.
Drafts on a State bank were presented at a national bank, and the vice-president of the national bank, with the authority of the cashier of the state bank, executed a written acceptance in the name of the cashier of the State bank. Held that, as one person cannot be an agent and a party at the same time except with the full knowledge and consent of the principal, the acceptance by the vice-president was not authorized, and hence was not evidence of a written acceptance under L. O. L. (Ore.), § 5965, requiring the acceptance of a bill to be in writing and signed by the drawee. Page 94a, No. 1447.

BANKS AND BANKING — CHECKS:
Defendant drew a check on its bank in O., and by indorsement made the check payable to its deposit bank in L., which thereafter became insolvent. The check was credited to defendant on the books of the L. Bank and sent to plaintiff, the L. Bank's correspondent for collection and credit. Plaintiff on receiving the check, payable by indorsement to the order of any bank or banker, in a letter advising that it was enclosed for collection and credit, credited the amount to the L. Bank's general account, and thereafter paid drafts against the account and made remittances to the L. Bank, so that its credit at the close of business on October 10th, when the L. Bank closed its doors, was much less than the amount of the check which, on being presented to the drawee bank for payment, payment was refused

BANKS AND BANKING — CHECKS — Continued.
because defendant had ordered payment stopped. Held, that plaintiff bank was a *bona fide* purchaser of the check for value, and not a mere subagent of the insolvent bank for collection and credit, and was therefore entitled to recover in the absence of proof that he purchased the check with actual knowledge of the deposit bank's insolvency or any infirmity connected therewith.
The rights of plaintiff as a *bona fide* purchaser being determined in accordance with the legal as distinguished from the equitable rights of the parties, it was entitled to recover the whole amount of the check, and was not subject to a deduction to the amount in its hands to the credit of the indorsing bank at the time of the latter's failure. No. 1441.
As a general rule, where a check is drawn payable to an actually existing person, and his indorsement thereof is forged, payment by the bank on which it is drawn is not an acquittance, though it also bears the indorsement of other banks through which it has passed; it having used no diligence to ascertain whether the payee's indorsement was genuine, and not having shown the other banks had used any.
Even if the fact that the endorsement of the payee of a check was forged by a person of the same name, living where the bank which first cashed it was located, could affect the liability to the drawer, of the bank on which it was drawn, which subsequently paid it, such indorsement cannot be presumed.
The rule that, where one, by representing that he is a certain other person, induces another to draw a check in his favor in the name of that person, the drawer cannot complain of its payment when indorsed by such imposter in the name assumed, does not apply where a check, payable to a certain person, is delivered to another on his false representation that he is the payee's agent and is paid on said imposter's forged indorsement of the payee's name.
Where H. falsely claiming to be F.'s agent, delivered to R. a deed of land, F.'s signature to which as grantor was forged, and received from R. a check payable to F., the bank on which it was drawn, being sued by R., on the ground that it

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BANKS AND BANKING — CHECKS — Continued.

was liable for payment of the check on the forged indorsement of F.'s name, may not introduce the deed in evidence for comparison of the signature thereto with that of the indorsement of the check; it being immaterial whether or not they are the same. Page 92a, No. 1446.

BANKS AND BANKING — COLLECTIONS:

Proceeds of a draft deposited with plaintiff bank for collection, sent to defendant bank and proceeds credited depositor by plaintiff and drawn out, draft uncollected, defendant bank not liable, but plaintiff bank entitled to recover from depositor, less their losses by reason of its negligence in not notifying them of non-payment. Page 8a, No. 1394.

BANKS AND BANKING — DEPOSITS:

A certified check of a depositor, properly indorsed, retained by its bank as collateral for loans to depositor, could not be recovered by executors as a balance on deposit in defendant's name. Page 7a, No. 1393.

Evidence held to show that a draft with bill of lading attached was deposited for collection, and not so as to pass title to the bank. Page 140a, No. 1470.

BANKS AND BANKING — DEPOSITORS:

A national bank bookkeeper induced defendants to deposit funds in the bank, and from time to time received money outside the bank to be deposited for them, but so manipulated accounts as to enable him to appropriate the money to his own use; checks against the deposit being charged against other depositors. On discovery of the bookkeeper's defalcations, his surety paid the bank the shortage and took an assignment of the bank's claim against defendants, arising through the overdraft resulting from charging their checks against their account. The national bank act (Rev. St. U. S., § 5190; U. S. Comp. St. 1901, p. 3486) requires a national bank to transact its business at the place specified in the organization certificate. Held, that as affecting defendant's liability to the surety, the bookkeeper must be deemed to

BANKS AND BANKING — DEPOSITORS — Continued.

have been defendants' agent, and not the bank's. Page 89a, No. 1444.

BANKS AND BANKING — DEPOSITS — TRUST FUNDS — NOTICE:

Where the source and nature of an account in the name of an estate were disclosed by the terms of deposit in bank, the bank must be held to have known that, if the administrator appropriated the deposit to his own use, the appropriation would be a breach of its trust.

Money deposited in a bank is held by the bank subject to the obligation to pay to the depositor on demand or to his order.

Where money is deposited in a bank, the checks of the depositor will not transfer the debt or title to the payee without the bank's consent. Page 141a, No. 1471.

BANKS AND BANKING — DRAFTS:

If a bank received a draft as a deposit, the title thereto passed to the bank; but, if the bank should only receive the draft for collection, title did not pass to it. Page 140a, No. 1470.

BANKS AND BANKING — NOTICE:

Where a cashier of a bank pledged notes with such bank as collateral security for his own indebtedness, the bank is not chargeable with his knowledge of any infirmity in such notes. Page 98a, No. 1449.

BANKS AND BANKING — FUNCTIONS—PAYMENT OF CHECKS:

A bank's failure to pay a check of a depositor drawn in favor of another does not render it liable, unless the check was presented at the proper time and place, properly indorsed, and, if transferred by the payee, properly indorsed by the transferee. Page 46a, No. 1416.

BANKRUPTCY:

To constitute an act of bankruptcy by a corporation by general assignment, some act purporting to transfer all property must be shown; a general assignment may be made without a formal deed; a general assignment is an act of bankruptcy even though invalid for some other purpose; preparation of a deed of general assignment not signed nor

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BANKRUPTCY — Continued.
out of escrow is not an act of bankruptcy; adoption of a resolution authorizing the treasurer to convert the assets into cash to be deposited for the creditors' benefit, if not executed, not an act of bankruptcy under the Act. Page 6a, No. 1392.
Bankruptcy Act July 1, 1898, c. 541, § 60a, which provides that where the preference consists of a transfer, the period of four months shall not expire until four months after the record of the transfer, as required by law, extends the time within which a transfer may be attacked as a preference, and where a transfer is one which is required to be recorded, the four months' period does not begin to run until the conveyance is recorded, but where the transfer, when made, was based on a present consideration, delay in recording does not warrant the court in treating the conveyance as if made as security for an antecedent debt, and a transfer given as security for a present loan is not a voidable preference, though the transfer is not recorded until within four months of the adjudication in bankruptcy of the transferror.
Rev. St. Mo. 1899, § 925, provides that no instrument shall be valid except between the parties and such as have actual notice, until deposited for record. Bankr. Act. July 1, 1898, c. 541, §§ 67a, 67e, 70e, confer on trustees the right to avoid transfers, voidable as fraudulent conveyances, or which may be avoided by creditors under the State law for want of record. A grantor, a corporation, conveyed its land to a grantee, a corporation, which on the same day executed a deed of trust to secure the purchase money notes. The grantor borrowed money from a bank and pledged as collateral the notes and deed of trust. Neither of the deeds were then recorded, but the bank later returned the deed of trust to the president of the grantor with instructions to record it, which was not done for nearly five years, and until within four months of the adjudication of the bankruptcy of the grantor. Before the record of the deed the grantor incurred debts to persons who relied on its ownership of the property. Held, that the deed of trust was constructively fraudulent as to creditors extending credit to the bankrupt, and the lien of the bank must be treated as invalid as against the trustee as a representative of the creditors. Page 65a, No. 1428.
In an action by a trustee to compel an accounting for a bankrupt's money wrongfully appropriated in fraud of its creditors, evidence held to sustain a finding that certain funds of the bankrupt were used to pay the debts of its president in fraud of creditors. Page 000a, No. 1422.
A trustee in bankruptcy has no other or greater rights than the bankrupt had when he became a bankrupt; and when a third person had at that time a right as against the bankrupt to a credit, he is entitled to assert such right in a suit by the trustee against him for an accounting. Page 61a, No. 1426.
Where a trustee is in possession of real estate incumbered by a deed of trust, deposited as collateral security with a creditor of the bankrupt, and the creditor voluntarily appears before the referee and presents his claim for allowance as a secured claim by virtue of the deed of trust, the referee has jurisdiction to summarily determine the validity of the lien. Page 65a, No. 1428.
Claimant directed bankrupts, who were brokers, through a branch office, to sell certain stocks, which the bankrupts did, delivering stock of their own and receiving payment therefor. On being advised of the sale, claimant delivered her stock to the manager of the branch office, and received from him a check in payment therefor. There were no funds in the drawee bank to meet the check at the time it was drawn. The bankrupts' insolvency followed, and it was not paid. Held, that the claimant had the right to recover the proceeds of her stock from the bankrupts' trustee, if they had not been dissipated, and, if they had been, she had the right to rescind the delivery and reclaim her stock, subject, however, to the right of the trustee to retain it by paying her the amount for which it was sold, and that it was therefore practically immaterial whether or not the bankrupts had converted the proceeds. Page 55a, No. 1423.

BANKRUPTCY — PREFERENCE:
To constitute a preference, a transfer must be made by the debtor while insolvent with the intent to give a preference, and the receiver must believe such was the intent; secur-

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BANKRUPTCY — PREFERENCE — Continued.

ity given for a present loan is not a preference though the borrower is insolvent; transfer of a land contract to secure a loan and advances to a specified amount by a bankrupt while solvent not a preference, each advance constituting a loan in exchange for present security. Page 4a, No. 1391.

BILLS AND NOTES:

The contract of indorsers for transfer is that, if the note is presented for payment at the time and place of maturity, and payment demanded and refused, and proper notice given thereof, they will pay the note to the holder.

Notice to indorsers of dishonor, when sent by mail, may be placed in the post office on the day after dishonor, allowing a sufficient time after the commencement of business hours on that day for the preparation of notice. Page 44a, No. 1419.

Under the Negotiable Instruments Law, which by section 130 makes the presentment of a note necessary to charge the indorsers, and by section 134 requires the notes to be exhibited to the person from whom payment is demanded, a mere informal talk asking payment of a note, not accompanied with a presentment of it or intended as a formal presentment and demand, is not sufficient to put the note in dishonor. No. 1443.

Under Negotiable Instruments Law, § 138, requiring that where there are several persons primarily liable on a note, and no place of payment is specified, presentment shall be made to all of them, an informal demand on one of two joint makers is not a basis for charging indorsers. No. 1443.

In an action on a note, where its presentment in a reasonable time is in issue, evidence that it was the custom of banks to hold demand paper with an indorser for years, if the parties were good and the bank did not require the fund, is admissible. No. 1443.

Evidence in an action on a note as to whether it had been presented within a reasonable time, held sufficient to sustain a verdict for plaintiff. No. 1443.

An instrument which acknowledges an indebtedness from the maker to a person named, and which promises to pay a specified sum to such person, "and in the event of any (maker's) death, I hereby authorize and direct payment of the same out of the funds of my estate," is a promissory note payable on demand, within Negotiable Instruments Law, §§ 26, 29, declaring that an instrument is payable on demand when no time for payment is expressed, etc.; the quoted clause being surplusage. Page 105a, No. 1452.

BILLS AND NOTES — Continued.

If the payee of a note of a corporation offered to renew it for a new note signed by the corporation and by its directors personally, and sent a note so drawn to the corporation to be executed and returned, and the directors so executed it that it bound only the corporation and themselves in their official capacity without calling the payee's attention to the changes therein, and the payee without noticing such change surrendered the old note, such surrender and acceptance of the renewal note would not bind the payee, being under a mistake of fact as to the identity of the instrument. Page 124a, No. 1463.

A note which upon its face refers to a mortgage, to the terms and conditions of which it is subject, in effect makes the note and the mortgage one instrument.

Under L. O. L. (Oreg.), § 5834, which provides that an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money, a note which upon its face states that it is given as a "part of the purchase price of real property, and is secured by mortgage of an even date herewith, and is subject to all the terms and conditions of said mortgage," the mortgage referred to giving the maker of the note an option to pay it, or to have it canceled within one year, is not a negotiable instrument.

Under the express provision of L. O. L. (Oreg.), § 5885, defining a "holder in due course," one who does not take a note in good faith, or for value, is not such a holder, and, as provided by L. O. L. (Oreg.), § 5891, a note in the hands of such holder is subject to the same defenses as if it were non-negotiable. Page 114a, No. 1458.

That one of the makers of a note drew ink lines through the signatures of three other makers without the consent of the payee did not constitute a cancellation of the note as to them. Page 149a, No. 1477.

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BILLS AND NOTES — Continued.

Where the holder of a negotiable note acquired the same after maturity, from one who became a bona fide holder for value and without notice before maturity, he is protected by the strength of his transferror's title.

One who takes negotiable papers before maturity in payment of or as security for an antecedent debt, without notice of any defect, receives it in due course of business and is a bona fide holder.

One who purchased a negotiable note after maturity and from the transferee of a partnership which acquired the note in good faith and for value before maturity was protected as a bona fide purchaser, though he was a member of the partnership. Page 148a, No. 1476.

A petition filed November, 1910, alleging that defendant guaranteed payment of a series of vendor's lien notes held by plaintiff, does not show that the action was prematurely brought before the debt had matured, but contains allegations sufficient to indicate that such note was one of a series payable monthly thereafter, and that payment of the annual interest on all of the notes had been refused. Page 165a, No. 1489.

Where a maker sued on a note by the payee bank's receiver claimed that the note was given for the bank's accommodation, and the receiver claimed that it was given for the benefit of another corporation in which the maker was interested, it was error to refuse to permit him to show the amount of the company's stock for comparison with his holdings. Page 150a, No. 1478.

Where a note executed in Missouri was payable in Michigan, it was governed by the law of Michigan as to the obligations and duties of the maker. Page 155a, No. 1482.

BILLS AND NOTES — ACCOMMODATION:

It is a defense to a note in the hands of a national bank's receiver that it was given in good faith to the bank solely for its accommodation, and on agreement that the bank would provide for its payment, and never call upon defendant maker to pay it. Page 150a, No. 1478.

BILLS AND NOTES — ACCOMMODATION PAPER:

Accommodation paper is discharged by payment by the accommodated party.

Relations and liabilities of parties to accommodation paper may be shown by parol evidence. Page 17a, No. 1400.

BILLS AND NOTES — ATTORNEY'S FEES:

It is the settled law of this State that stipulations incorporated in promissory notes for the payment of attorney's fees, if the principal and interest be not paid at maturity, are contrary to public policy and void.

Sections 8106 and 8107 of the General Code do not give validity to such stipulations, but provide only that they shall not destroy the negotiable character of instruments in which they are incorporated. Page 144a, No. 1473.

BILLS AND NOTES — BONA FIDE PURCHASERS:

Though the deposit by the business manager of a corporation of a check to the corporation indorsed by the manager to the credit of his private account in a bank is a transaction which would put the bank on inquiry, yet, where inquiry would have shown a power of attorney to him authorizing the opening of a bank account for the use of the corporation, the deposit of checks, etc., the withdrawal of the proceeds, the pledging of the corporation's credit, and for such purposes the signing, indorsing, accepting, making, execution, and delivery of checks, notes, drafts, and bills of exchange, and would also have shown a resolution of the corporate directors, empowering him to use the checks of the company until he had reimbursed himself for moneys he had personally advanced for the corporation in an amount not exceeding $2,000, the bank would be justified in crediting the manager personally with the proceeds of the check, and the corporation cannot maintain an action to recover such proceeds. Page 96a, No. 1448.

Where a note was made on a printed blank giving the name of a bank as the place of payment, which bank to the knowledge of most, if not all, of the makers, had previously changed from a State to a national bank, changing its name, but continuing in business in the same building, the

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BILLS AND NOTES — BONA FIDE PURCHASERS — Continued.
fact that the name of such bank was correspondently changed in the note after its execution, without the knowledge of the makers, did not constitute a material alteration, which invalidated the note in the hands of a bona fide holder.
That a note was blank as to the name of the payee when signed, and was filled in by the person to whom it was delivered, does not impeach its validity in the hands of a bona fide purchaser without notice. Page 98a, No. 1449.
In an action on a promissory note by one claiming to be an innocent purchaser, the production of the note by the plaintiff, properly indorsed by the payee, makes out a prima facie case that plaintiff had become its holder for value, before maturity, in the usual course of business, and without notice of anything to impeach the title.
Under the rule of the federal courts, a transfer of a negotiable note by indorsement before maturity as security for an antecedent debt is a transfer for value in due course of business.
A bona fide holder of a negotiable instrument, who, for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, took it by indorsement before maturity, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without legal validity. Page 98a, No. 1449.
Where a note given for an illegal consideration was purchased by plaintiff before maturity, it was enforceable on proof that plaintiff was an innocent holder.
Persons dealing in commercial paper are bound to use reasonable diligence to ascertain the nature of the transaction in which the notes were given, if the circumstances under which the paper is offered for sale are calculated to excite suspicion of a reasonably cautious person.
Where the circumstances surrounding the transfer of a note show that the purchaser has refrained from making inquiries lest he become acquainted with the transaction out of which the note originated, which would have shown illegality of consideration, the purchaser is not a bona fide holder.

BILLS AND NOTES — BONA FIDE PURCHASERS — Continued.
Evidence held to warrant a finding that plaintiff bank when it purchased a note sued on possessed sufficient knowledge concerning the payee to place it under legal duty to make inquiry concerning the legality of the consideration, and, having failed to make such inquiry, could not recover on the note which was in fact based on an illegal consideration. Page 102a, No. 1450.

BILLS AND NOTES — CHECKS:
The payee of a check cannot sue the drawee for nonpayment before acceptance or certification, under Negotiable Instruments Law, § 325.
If a check was paid by being credited in the book of the indorsee and marked "paid," the payee was thereby relieved of liability as indorser; the indorsee's remedy for the refusal of the bank to permit the credit to stand being against the bank. Page 104a, No. 1451.

BILLS AND NOTES — CHECKS — BONA FIDE HOLDERS:
One receiving the check of a corporation in payment of a personal debt of an officer is *prima facie* charged with notice that the officer is not authorized to use the corporate funds for such purpose, and hence is bound at his peril to inquire as to the truth of the situation.
Evidence held to sustain a finding that defendant acted in bad faith in accepting a check from the president of a corporation, drawn on the corporate funds for his personal debt, in that he knew facts suggesting the defect in the officer's title to the funds. Page 55a, No. 1422.

BILLS AND NOTES — DEMAND NOTES:
Demand paper is overdue if it remains unpaid for an unreasonable time after its date, or the date of delivery. Page 146a, No. 1474.

BILLS AND NOTES — DRAFTS:
Where a bill of exchange is drawn upon one bank in favor of another, evidence that the bank upon which the bill was drawn could have obtained sufficient of the drawee's funds for payment was immaterial in an action on the bill for L. O. L. (Oreg.), §§ 5960, 6022, provides that a check or bill does not operate as an assignment of any part of the

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BILLS AND NOTES — DRAFTS — Continued.

funds of the drawer, and that the payor is not liable until acceptance. Page 94a, No. 1447.

BILLS AND NOTES — EVIDENCE:

A photographic copy is admissible upon preliminary proof of the accuracy of the photograph.

When writings are admissible, expert testimony is permissible in deciding whether they are fac-similes.

An heir may not, by his admisssions or statements, bind his co-heirs. Page 17a, No. 1397.

BILLS AND NOTES — INDORSEMENT:.

Payee's signature on the face of a note under the signature of the maker, held to be a good indorsement.

The holder of a negotiable note is presumed to be such, bona fide and for value, and unless defendant negatives one or both facts, his defense fails; proof of fraud in the procurement of the note negatives such presumption. Page 15a, No. 1398.

Indorsement, sale and delivery of a note to another authorizes the latter to sue thereon in his own name. Page 13a, No. 1397.

The "indorsement" of a bill or note is not merely a transfer, but it is a new contract, by which the indorser engages that the bill or note will be accepted or paid as the case may be; this engagement being conditional upon presentment of demand and notice, and that the bill is a genuine and valid instrument.

As between the indorser and indorsee, it is immaterial whether the indorsement is made before or after maturity, save that, when the indorsement is made before maturity, the time of payment is fixed by the terms of the instrument, and, when made after maturity, payment must be demanded within a reasonable time, and notice of a refusal be given to the indorser in order to charge him.

Where an indorsement is made after maturity, the question of what is a reasonable time for a demand for payment may, when the facts are ascertained, be determined by the court as a matter of law; and where they are few and simple it may likewise be determined by the court.

Where the payee of notes, who, for the purpose of using them as collateral, indorsed them in blank, and later, after paying the debt for which they were pledged and receiving them back, sold them with the indorsement upon them, this act was equivalent to a new indorsement, rendering him liable in case of the maker's failure to pay the notes at maturity. Page 146a, No. 1475.

BILLS AND NOTES — NEGOTIABILITY:

A provision in a note that, in case of non-payment at maturity, the holder may extend it, does not make it nonnegotiable. Page 000a, No. 1389.

An instrument that the maker borrowed and received a sum "payable April 1st, 1904, with interest," held to be a promissory note, but nonnegotiable. Page 11a, No. 1395.

A letter promising to pay the general agent of an insurance company the first annual premiums, being conditional on the agent performing his part of the contract, held not to be negotiable. Page 11a, No. 1396.

A promissory note, otherwise negotiable, due six months after date, with interest from maturity until paid at the rate of six per cent. per annum, contained a recital that certain collateral security, was attached thereto, the market value of which was stated to be $6,250, and contained in addition the following stipulation: "If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver, when demanded, additional security to the satisfaction of the holder; otherwise this note shall mature at once." Held, that the instrument is nonnegotiable (1) because it contains a promise to do an act in addition to the payment of money; (2) because the date when it is to become due is uncertain. Page 50a, No. 1420.

Unless an instrument is negotiable, action cannot be maintained on an indorsement for transfer.

Where a note was made in California prior to Act April 4, 1902, and was transferred by indorsement in New Jersey after said enactment, its negotiability was not governed by said act, but by the pre-existing law, as section 195 of the act expressly declares that it does not apply to ne-

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BILLS AND NOTES — NEGOTIABILITY — Continued.

gotiable instruments made and delivered prior to the passage thereof.

A provision in a note that on default in payment of interest, payable semi-annually, the whole shall become due did not affect the negotiability of the note. Page 49a, No. 1419.

BILLS AND NOTES — NEGOTIABILITY — ATTORNEY'S FEES:

The negotiability of a note is not affected by a stipulation that, on suit or employment of an attorney to enforce it, an additional sum of six per cent. on principal and interest shall be paid as attorney's fees. Page 49a, No. 1419.

BILLS AND NOTES — PAYMENT:

Not necessary to prove demand at time and place fixed in the note, but if funds for payment were there for the purpose, non-presentation of the note relieves maker of costs; deposit of funds by maker of a note payable at bank, does not discharge the obligation, unless holder has deposited note in the bank for collection. Page 15a, No. 1399.

Complainant's failure, due to his own efforts, to receive payment of one of four notes secured by a mortgage which provided that on non-payment of any one at maturity all became due, held that he was not entitled to foreclose for the whole debt. Page 15a, No. 1399.

Where the maker of a note paid the amount thereof to the original payee without requiring the production of the note, such payment is at the risk of the maker and does not discharge the note as against a transferee thereof. Page 148a, No. 1476.

BILLS AND NOTES — PRESENTATION:

The determination of reasonable diligence in presenting a check to charge the drawer, is one of law for the court. Page 18a, No. 1401.

BILLS AND NOTES — SIGNATURES:

The genuineness of a signature may be proved by other genuine signatures in the case; comparison may be made by the jury with or without experts.

That two signatures are exactly alike, is evidence that one was traced or reproduced from the other, or that both were made from still another. Page 14a, No. 1397.

BILLS AND NOTES — WHAT LAW GOVERNS:

Where a note, made in California, was transferred by indorsement in New Jersey, the liability of the indorsers is determined by the New Jersey law. Page 49a, No. 1419.

BILLS AND NOTES — TIME:

Where parties interested in an estate had been impleaded in an action on a note made by the executors in an estate matter, to the making of which they had consented, they cannot on appeal from a judgment for the holder complain that, in considering the question of a reasonable time for presentment, the holder treated the note as an obligation of the estate, instead of that of the executors individually. No. 1443.

BOUNDARIES:

The call for quantity may be resorted to, to aid in locating descriptions which would otherwise be uncertain. Page 166a, No. 1490.

BROKERS:

Where agreement with broker to sell real estate is invalid unless it or a memorandum is in writing, letters of owner authorizing sale are sufficient. Page 32a, No. 1408.

Where a broker was given power to sell land for cash, whereby part of the purchase price was to be paid at the time of entering the contract, and the remainder upon delivery of the deed, was within his powers and binding on the principal.

While, upon proper pleadings, equity will relieve a person from a written contract entered into through fraud or mistake, vendors of land who entered into a contract giving a broker an agency for its sale cannot, where the contract was a continuing one, be relieved from a sale made by him merely because they understood that the agency was to expire at a given time; their understanding being immaterial to the interpretation of the contract. Page 166a, No. 1490.

BROKERS — CONTRACTS:

A contract, whereby vendors appointed brokers to enter into a written contract for the sale of land, with the provision that if they should withdraw the property from sale before 1905 the brokers should receive certain compensation, does not, by its terms, expire in 1905. Page 166a, No. 1490.

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CARRIERS:

Unlawful discrimination for a railway to refuse delivery of freight to a plant on its belt line, even though the plant be connected by a spur track. Page 21a, No. 1402.

The burden of proof is on the carrier who fails to deliver live stock in good condition when so received, that such failure is due to inevitable accident or some cause inherent in the live stock. Page 23a, No. 1403.

A railway, though a private carrier, was held liable for injuries caused by negligence, resulting in the death of a person riding on a pass, which stipulated that the holder waived all claim for damages for injuries, such agreement being against public policy, and no contract could relieve the carrier of the exercise of ordinary care. Page 24a, No. 1404.

A clause releasing a carrier for liability for loss of goods, will not include its negligence; provision in a ticket that liability for baggage shall not exceed fifty dollars will relieve carrier of liability for negligence; shipment at reduced rates limiting liability to a specific valuation covers loss arising from negligence. Page 23a, No. 1413.

A carrier acts at its peril in the delivery of freight, and neither fraud nor mistake will excuse a delivery to one not the consignee. Page 57a, No. 1424.

Under the rule that the owner of property set apart to a public use impliedly agrees to be governed by such reasonable regulations as the public may adopt to promote the common convenience and general welfare, the State may enact reasonable regulations fixing the rates for transportation of freight and passengers, or prescribing any reasonable rules as to service, if such regulations do not interfere with interstate commerce, or take property for public use without just compensation, or violate any express charter provision granted by the State to the corporation. Page 59a, No. 1425.

Where a common carrier undertakes to transport merchandize, the presumption is that he does it subject to the common-law liability, and this presumption remains until it is overcome by proof of a special agreement. Page 107a, No. 1454.

Where goods are accepted for shipment, whether intended to be immediate or remote, the placing of the

CARRIERS — Continued.

goods upon its platform renders a carrier responsible for any damages thereto from fire originating within its right of way, unless released from liability by the shipper.

A carrier's rule that it assumed no risk for cotton placed upon its platform unless tendered for immediate shipment may be waived, and where it accepts cotton intended for shipment at some future time, the cotton will be upon its platform with the carrier's "consent," under Civ. Code (S. C.) 1902, § 2135, making a carrier responsible for loss by fire originating on its right of way, except for property which has been placed upon its right of way illegally or without its consent.

In an action against a carrier for the loss of cotton destroyed by fire while on defendant's platform, the question whether it had been placed there by defendant's consent as cotton tendered for immediate shipment, notwithstanding a rule that the carrier assumed no risk for cotton put upon its platform, unless tendered for immediate shipment, held for the jury. Page 108a, No. 1455.

A carrier receiving property for transportation to a point on another line in another State is conclusively treated as having made a through contract of carriage, rendering it liable for the other carrier's negligent failure to deliver the shipment to the consignee.

Proof of delivery of an interstate shipment to the initial carrier, and of failure to deliver the same to the consignee, raises a presumption of negligence, so as to give rise to the liability for loss or damage caused by it or any other carrier in the chain of transportation, and casts upon it the burden of proving that the loss resulted from some cause for which such initial carrier was not responsible in law or by contract. Page 000a, No. 1480.

Where in an action for injuries to a street car passenger, required to leave the car to board another car because of excavations at a point where the street was rough and uneven and filled with loose dirt and stones, she slipped, and was injured, a special verdict that there was nothing to prevent her from seeing the condition of the street, did not show contributory negligence sufficient to overcome a general verdict in her favor.

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CARRIERS — Continued.

A general verdict in her favor is not overcome, under the rule that, where answers to questions of fact are inconsistent with or contradictory of each other, the special findings do not overthrow the general verdict.

The duty of a carrier of passengers to exercise the highest degree of care for its passengers applies to street railroads.

The rule which requires only ordinary care of railroad carriers in maintaining safe places for the ingress and egress of passengers at regular stopping places does not apply to the obligation imposed to alight from a car to board another, the requirement to alight being brought about by the company. Page 152a, No. 1479.

CARRIERS — BILL OF LADING:

"Where a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft, as the case may be."

While the general rule is that where one orders goods to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the carrier is a delivery to the purchaser, the carrier being the agent of the purchaser to receive them, and when this is done the title passes from the vendor to the vendee, this general rule, however, is subject to exception. If for any reason the seller, at the time of the shipment, and delivery of the goods to the common carrier, takes a bill of lading to his own order, and attaches thereto a draft for the purchase money, he thereby expresses his intention to retain the title until the draft is paid, or accepted, and secured; and, where this method of shipment is adopted, the carrier becomes the agent of the seller or consignor, and would be authorized to deliver the goods only on a surrender to it of the bill of lading. Page 105a, No. 1453.

CARRIERS — BILL OF LADING — LIMITATION OF LIABILITY:

The mere acceptance by a shipper, without objection, of a receipt or bill of lading tendered by the common carrier that contains a stipulation importing a limitation of the carrier's liability, based upon an assumed valuation of the goods that does not correspond with their real value, is not conclusive evidence of the shipper's assent to such limitation.

Where the shipper accepted in silence from an express company a shipping receipt containing an express limitation of the company's liability to fifty dollars, and it appeared that the shipper did not assent to such a limitation, and did not know that the receipt contained such a limitation. Held, that the trial judge, sitting as a jury, was justified in concluding, as matter of fact, that the limitation to fifty dollars was not a part of the contract between the parties. Page 107a, No. 1454.

CARRIERS — LIMITATION OF LIABILITY:

The burden of showing an agreement, limiting the common-law liability of a carrier, rests upon the carrier. Page 107a, No. 1454.

CHATTEL MORTGAGE:

The mortgagee in a chattel mortgage need not give notice of his intention to take possession; upon taking possession he is not required to assume, perform or complete the contracts of the mortgagor; he does not get absolute title to book accounts, though included in the mortgage, by statutory foreclosure; he is not required by law to collect them; he is not required to perform acts to perfect title to the property even though it be lost through omission to do so.

When the mortgage secures several debts which it is insufficient to pay, the mortgagee may elect to which debts it shall be applied; bringing suit on some of the debts, is an election to apply the mortgaged property to those not put in suit. Page 27a, No. 1405.

The essentials of a chattel mortgage are the existence of a debt, legal liability, or obligation, and an intent to secure the same by some form of conveyance.

Though an instrument purports to be an absolute transfer of chattels, a defeasance may be proved by parol, and thus establish a chattel mortgage; but the evidence must be clear and convincing. Page 61a, No. 1426.

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CHATTEL MORTGAGE — Continued.
The provisions of the contract that the dealer should repossess any instrument sold under agreement when necessary, and to resell the same for an amount equal to the balance due, with interest, or, in default, to replace the same or any deficiency with cash, etc., applied only to cases where the purchasers of pianos failed to keep up payments, and the dealer found it necessary to repossess the instruments, and they did not make the contract a chattel mortgage.
The provision that the dealer should carry insurance did not make the contract a chattel mortgage, and prevent it from vesting in defendant title to pianos procured. Page 61a, No. 1426.
Even at law, a tender of the debt by the mortgagor after the law day, but before seizure of or demand for the chattels, revests legal title in him. Page 111a, No. 1457.
In a prosecution for disposing of mortgaged property, evidence of accused's possession of the property prior to the time of disposition is admissible.
The progeny of mortgaged animals, born after the making of the mortgage, are subject to its lien; and in a prosecution for disposing of mortgaged animals evidence of the birth of such progeny is admissible.
Under Alabama Code, making it an offense to sell any mortgaged personalty, where an indictment charged the disposition of a number of mortgaged animals, proof, showing an unlawful disposition of one of them, was sufficient for conviction. Page 154a, No. 1481.

CHATTEL MORTGAGES — "INTEREST."
That the dealer agreed to pay interest was not sufficient to make the transaction a chattel mortgage, for "interest" may include recompense for the use of anything that has an ascertained pecuniary value, as well as money. Page 61a, No. 1426.

CHATTEL MORTGAGES — SALES:
Where it is sought to show that an instrument, apparently a consignment contract, or bill of sale, is a chattel mortgage, it is competent to consider the circumstances under which the instrument is made, as well as the practical construction given to it by the parties in their dealings under the instrument.

CHATTEL MORTGAGES — SALES — Continued.
Evidence of the practical construction placed by the parties on a contract between a retail piano dealer and defendant, who furnished the money to pay the makers for pianos bought by the dealer, held to show that the contract was intended to pass title to the pianos to defendant, and not to be merely a mortgage to secure advances. Page 61a, No. 1426.
A contract between a retail piano dealer and defendant provided that defendant, paying for pianos purchased by the dealer for himself, should consign them to the dealer for sale, and that the dealer should accept, on consignment, such pianos at prices and on conditions agreed on; that the dealer should report all sales and settle for cash sales immediately; that lien notes should be indorsed to defendant until the amount due for the instruments represented was settled, with interest; that the dealer's commission should be the amount for which instruments were sold in excess of the cost thereof, and represented by consignment receipts, reciting that the instruments should remain the property of defendant; and that the dealer should make all collections, and carry insurance to cover cost of instruments in stock, and to surrender to defendant, on thirty days' notice, unsold instruments held on consignment Held, that the contract vested in defendant the title to pianos purchased from manufacturers and paid for, and was not a chattel mortgage to secure defendant, the term "to consign" meaning to transfer to a factor for sale, and the term "consignment" indicating title in the consignor.
The stipulation for commissions to the dealer did not prevent the contract from vesting title in defendant and to make the dealer his agent in selling pianos, for, in the absence of a special agreement, a factor is entitled, on the performance of services, to the customary commissions on the amount of goods sold, and commissions need not be on a percentage basis.
The fact that sales of pianos were made in the name of the dealer did not prevent the contract from vesting title in defendant; it being customary for commission merchants to sell in their own names. Page 61a, No. 1426.
Under the facts stated in the opinion, it is held that the sale of a span of

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CHATTEL MORTGAGES — SALES — Continued.

mules was a sale for cash; that delivery of the mules was conditioned upon payment of a check upon a bank, given for the price; and that an oral chattel mortgage, given by the purchaser to the bank which furnished the money to meet the check, was valid, and, as a purchase-money mortgage, was superior to exemption rights claimed by the widow of the mortgagor. Page 110a, No. 1456.

COMMERCE — EMPLOYERS' LIABILITY:

The laws of the several States, in so far as they cover the same field, were superseded by the enactment by Congress of the Employers' Liability Act regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce. Page 160a, No. 1485.

COMMERCE — FEDERAL POWER:

The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one State to a point in another State, of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss, in spite of any stipulation limiting liability to its own line, is a valid regulation of interstate commerce. Page 153a, No. 1480.

CONSTITUTIONAL LAW:

While the legislature cannot delegate its power to enact laws, it may direct that the application of a statute to a given district or to a specific state of facts shall depend upon the existence of certain conditions, to be ascertained in a particular manner, or by particular persons. Page 59a, No. 1425.

Const., art. 3, divides the powers of government into the legislative, the executive, including the administrative, and the judicial departments, and provides that no person charged with official duties under one of them shall exercise any function of another. The Railroad Commission Act (Ore.), section 12, requires every railroad to furnish reasonably adequate service, equipment, and facilities. Section 22 requires every railroad to provide and maintain suitable depot buildings and clean toilet rooms at its regular stations. Section 28 provides that upon complaint of any person that any service is inadequate the commission may notify the company that complaint has been made, and, after giving it ten days' notice, may investigate the charge, compelling the attendance of witnesses, etc.; and, if the service is found insufficient, may make such orders in regard thereto as are reasonable. Section 53 imposes a penalty for neglecting any order of the commission. Held, that the Railroad Commission Act did not violate Const., art. 3, by empowering the commission to determine whether railroad companies had complied with their statutory duties as to service, etc., and to prescribe what was a reasonable service, in case they were not rendereing such service. Page 59a, No. 1425.

A savings bank, so far, at least, as its rights are involved in those of its depositors, may raise the objection that property is taken without due process of law by Mass. Laws 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives. No. 1442.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — EMPLOYERS' LIABILITY:

Congress, possessing the power exercised in the employers' liability act, made no unwarranted interference with the liberty of contract by declaring in the fifth section of that act that any contract, rule, regulation, or device, the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created shall be void.

The imposition of the liability, created by the employers' liability act, upon interstate carriers by railroad only, does not invalidate the statute under the due-process-of-law clause of the Fifth Amendment of the Federal Constitution, on the ground that it makes an arbitrary and unreasonable classification. Page 160a, No. 1485.

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CONSTITUTIONAL LAW — RAILROADS:

Railroad companies are required by statute to erect suitable depots. The power to determine when they should be required to erect a depot at a particular place may be delegated to a railroad commission. Page 59a, No. 1425.

CONSTITUTIONAL LAW — SAVINGS BANKS:

Savings banks are not unconstitutionally discriminated against by making applicable to them alone the provisions of Mass. Laws 1907, c. 340, that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

The obligation of the contract between a savings bank and its depositor is not unconstitutionally impaired by Mass. Laws 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives. No. 1442.

CONTRACTS:

May be made by correspondence; may be partly oral; parol evidence inadmissible to complete or vary an insufficient written contract; formal written agreement required to make contract, after correspondence and oral negotiations. Page 31a, No. 1408.

The place where a contract is made depends not on the place where it is actually written, signed, and dated, but on the place where it is delivered. Page 46a, No. 1416.

A stipulation in a bill of sale of a business that the seller will not engage in a competing business within a limited territory for a limited period of time, is not contrary to public policy, but will be enforced to enable the seller to sell his business at full value, and to enable the purchaser to obtain the personal favor of the seller. Page 47a, No. 1417.

Where a contract made written acceptance by the architect a condition precedent to payment, a recovery can be supported only by proof of acceptance.

Where a contract made written acceptance by the architect a condition precedent to recovery, and no waiver was pleaded, an acceptance after suit will not support recovery and is inadmissible in evidence, for until acceptance the purchaser is not in default. Page 157a, No. 1483.

A reduction of a contract to writing supplants all prior or contemporaneous verbal agreements. Page 166a, No. 1490.

Contracts in violation of statutes, enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, which contain a prohibition and impose a penalty, are void. Page 171a, No. 1493.

CONTRACTS — CONSIDERATION:

In the absence of fraud or overreaching, the courts will not inquire into the adequacy of the consideration of a contract, but will only inquire into its legality. Page 64a, No. 1427.

CONTRACTS — REFORMATION OF:

When an owner granted right of way to a railway in consideration of switching privileges, conveyance and privileges constituted an instrument, and though the owner was not a party to his tenant's contract with the railway, he could sue to reform the contract; the covenant in the contract ran with the land and a subsequent lessee was entitled to the benefits.

A suit in equity to reform an instrument may be brought at any time within the statutory limit of ten years. Page 32a, No. 1407.

CONTRACTS — RESTRAINT OF TRADE:

A contract for the sale of a business may impose a reasonable restraint of trade.

A contract imposing a partial restraint of trade must be incidental to another contract or sale, in which the covenantee has an interest requiring protection.

A contract in restraint of trade will be sustained only when the restraint is not more extensive than is reasonably required to protect the covenantee's interest in the property sold, and when it does not interfere with the public's interest by creating a monopoly.

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CONTRACTS — RESTRAINT OF TRADE — Continued.

Plaintiff sold to defendant certain laundry machinery, which plaintiff had used in his business, in consideration of $1,600, and the contract further provided that plaintiff had abandoned the shirt, collar, and cuff laundry business, and confined its business to doing family laundry and special work in shirts, collars, and cuffs from hotels, and that such stipulations should bind plaintiff, so far as the city or territory adjacent thereto was concerned. Held, that the agreement to abandon the shirt and collar business in the city was merely ancillary to the contract for the sale of the laundry machinery, within the rule requiring a contract imposing a partial restraint of trade to be incidental to another contract. Page 79a, No. 1437.

CONTRACTS — WHAT LAW GOVERNS:

The construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed. Page 48a, No. 1418.

CORPORATIONS:

Mass. St. 1907, c. 290, effective April 13, 1907, relating to the dissolution of certain corporations, provided (section 2) that nothing in the act should affect any suit pending by or against any corporation mentioned in the first section thereof. Held, that the word "suit," as used in such section, included every proceeding in a court of justice by which a person might pursue a remedy afforded by law, including an action at law, and that the word "pending" was descriptive of the action from the date of the writ, so that, the writ in a suit by a corporation having been dated April 9, 1907, the suit was pending, and was not abated by the dissolution of the corporation under such act, notwithstanding the reference in section 1, St. 1903 of Mass., c. 437, sections 52 and 53, continuing the corporate existence of dissolved corporations, for three years only, to prosecute and defend suits. Page 44a, No. 1415.

Where the incorporators took the formal steps required by statute to entitle the corporation to a certificate of incorporation, and the secretary of state issued a certificate in due form, the corporation was a *de facto* corporation, though it had no stockholders, and though no part of its capital stock was paid in.

A transfer of property by or to a *de facto* corporation cannot be collaterally attacked, and is valid against all persons except the state. Page 65a, No. 1428.

In detinue for machinery, in which a claim was interposed by a third party under a chattel mortgage, evidence that plaintiff had informed a stockholder and director of claimant, though before the claimant corporation was organied, that the title to the machinery was in the plaintiff, was admissible in evidence to show actual knowledge of plaintiff's claim by claimant corporation, making its exclusion prejudicial error to plaintiff. Page 111a, No. 1457.

The fact that the secretary of a corporation, in signing a renewal note of the corporation which the payee understood was to be signed by the directors personally, in adding the word "Sec." to show that he signed merely for the corporation, used different ink from that in which the original signatures were written, would not of itself give notice to the payee afterwards accepting the note of such change. Page 124a, No. 1463.

Where an officer of a street railway company which purchased the right of way of an insolvent company was also an officer of the insolvent company, his knowledge as to the rights of a railroad company in a crossing was attributable to the purchaser.

CORPORATIONS — FOREIGN CORPORATIONS:

General Corporation Law (N. Y.) provides that no foreign stock corporation, other than a moneyed corporation, shall do business in the State without having first procured a certificate that it has complied with the requirements, and that no foreign stock corporation shall maintain an action upon any contract made in the State unless it has secured such certificate. Held, that a contract executed within the State by a foreign stock corporation which had not complied with the statute was not void, but only unenforceable in the courts of the State. Page 158a, No. 1484.

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COURTS:

The damage caused by the failure of a connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable, is not traceable to a violation of the statute, redress for which can only be had in the Interstate Commerce Commission or in the federal courts.

The jurisdiction of State courts extends to any civil and transitory cause of action created by a foreign statute, provided it is not opposed to the public policy of the State in which the suit is brought.

A State court may enforce the liability of an initial carrier of an interstate shipment by which such carrier is made liable for a loss beyond its own line. Page 153a, No. 1480.

DAMAGES:

For any inexcusable violation of a valid contract, the defaulting party, whether there be any express stipulation to that effect or not, must respond in damages to the extent of fairly compensating the other party for the injury suffered.

Where a contract is conditioned for the performance of a collateral agreement, the sum mentioned therein as accrued damages will be presumed to be a penalty; and it is incumbent upon the party desiring to recover the sum mentioned as liquidated damages to show that it was so intended by the parties.

When the actual damages in the case of a breach of contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract, or the circumstances under which it was made, indicate a contrary intention, or it so manifestly exceeds the actual injury suffered as to be unconscionable.

Where parties are competent to contract, are equal masters of the situation, and deal at arm's length, a court of equity will not disturb the measure of damages established by them, unless it is so grossly unconscionable and oppressive as to shock the conscience of the court.

Defendant conveyed real property to the plaintiffs for the purchase price of $16,300, of which a part was paid in cash, and a remaining $7,500 paid by a note which stated that it was subject to all the terms

DAMAGES — Continued.

and conditions of a mortgage of real property, which it was given to secure; the mortgage by its own terms, and by reference to the terms of a separate agreement, providing that the plaintiffs should furnish defendants a certain amount to be expended on the property within a year, and that on performance of such condition plaintiffs should have an option either to pay the note, or within a year to require defendant, upon prescribed notice, to repurchase the property for $24,000 cash within thirty days; and, as liquidated damages for the defendant's failure to repurchase, it was provided that the mortgage given by plaintiffs should, together with the debt secured thereby, become immediately void, and the defendant should thereupon cancel the note and release the mortgage of record. Held, that the provision for liquidated damages in the alternative, on defendant's failure to repurchase, was not so unconscionable as to prevent its enforcement in plaintiff's action for the cancellation of the note and mortgage. Page 114a, No. 1458.

DEEDS:

A corporation, by its president, executed a deed to another corporation of which the same person was president, and on the same date the grantee, by its president, executed a deed of trust to secure purchase-money notes. Both corporations treated the deed as delivered, and the deed of trust and the purchase-money notes were pledged as collateral for a loan made to the grantor by a third person. Held, to show that the deed was delivered so that title passed thereunder prior to the execution of the deed of trust. Page 65a, No. 1428.

ESTOPPEL:

Where one of two innocent persons must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. Page 72a, No. 1433.

An estoppel, whether resting in judgment, deed, contract, or in pais, means only that a man is forbidden to show the existence of a fact where, by his past conduct, declarations, agreement, deed, or judgment, it would work an injustice and an

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ESTOPPEL — Continued.
injury to his adversary to permit him to do so. Page 117a, No. 1459.
One holding an option to purchase an undivided half interest in land at four dollars an acre, by claiming on a former trial of a suit for specific performance, that the option was an offer to sell the vendor's interest at two dollars an acre and that a tender made in the language of the option was a tender of that amount, was not estopped to claim on a subsequent trial, and after the Supreme Court decided on appeal that the price was four dollars an acre and not two dollars, as found by the trial court, to present his offer as a sufficient tender at four dollars an acre and as an acceptance of the option; he not having been put in default by any demand by the vendor for payment.
An equitable estoppel is not raised by conduct of one party to a suit unless, by reason thereof, the other party has been so placed to as make it unjust to him to allow the first party to change position.
One suing on a contract can claim a construction unjustly favorable to him and ask for a larger judgment than he is entitled to without being estopped to claim his lawful right before the cause is determined, if the other party will not be prejudiced by the change of claim.
To constitute estoppel, the condition caused by the conduct of him to be estopped, must be such that the other party will be prejudiced, if the first party is permitted to pursue another course, and claimant of the estoppel must himself have been ignorant of the truth of the matter or of the extent of his rights concerning the same. Page 119a, No. 1460.
Any negligence of the cashier of a bank in accepting a renewal note without examining it to see if it was signed by the directors of the maker-corporation personally as understood by the parties would not estop the bank from rescinding acceptance of the renewal note for mistake, in absence of a showing that the parties had changed their position to their injury. Page 124a, No. 1463.

ESTOPPEL — CHECKS:
The rule that, where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, must bear the loss, applies where one gives a bank check and takes to secure the same a mortgage on land represented as owned by him, though in fact not so owned, and the bank pays the check to the identical person, although not to the person who in fact owned the land attempted to be mortgaged. Page 139a, No. 1469.

ESTOPPEL — TRUST FUNDS:
Negligence by the next of kin in failing to make a defaulting administrator account will not preclude his successor from recovering from the bank, where the estate funds were deposited, the amount of checks drawn on the estate account by the administrator and deposited to his individual account in the same bank, whereby the defalcation was made. Page 141a, No. 1471.

EVIDENCE:
Where the applicant for insurance was not deceived and no fraud was practiced, parol evidence is inadmissible to vary the application.
One who signed a contract without reading it, cannot plead that fact.
Though an insurance company retains part payment of a policy, and the applicant dies before delivery of policy, the company incurs no liability. Page 29a, No. 1406.
Where a written contract between a retail piano dealer and a third person proceeded on the theory that the title to pianos procured from manufacturers and paid for by the third person was in the latter, but did not show how the title was to pass to him, evidence of a prior oral agreement that the third person should take the place of the manufacturers, and that the dealer would buy the pianos and give a consignment receipt for them to the third person, was admissible to illustrate the meaning of the contract, without contradicting it. Page 61a, No. 1426.
To show that a renewal of a promissory note originally executed by a corporation was accepted by the payee under the impression that it was signed personally by the directors as well as by the corporation, when it was only signed by the directors for the corporation, does not violate the parol evidence rule; such evidence showing a mistake as to the identity of the subject-matter of the contract.

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EVIDENCE — Continued.

The rule that one who signs a contract without reading it, when he has an opportunity to do so, cannot rely upon his ignorance to avoid the contract, would not apply to prevent the payee of a note from showing that a renewal note was accepted by it under the belief that it was signed personally by the directors of the corporation as well as by the corporation; no rights being asserted under the contract, and the note not being signed by the accepting party and not being the sole evidence of the transaction. Page 124a, No. 1463.

Parol evidence being inadmissible to vary or contradict a written instrument, a contract of indorsement, whether special or in blank, cannot be explained or denied by parol evidence, except to show failure of consideration or an irregular indorsement, or to impeach the indorsement for fraud, or to show that it is the subject-matter of a trust. Page 146a, No. 1475.

EXECUTORS AND ADMINISTRATORS:

When an administrator filed only a first account, on which no action was taken until after his death, decree upon the second account, presented by the second administrator, who was also administrator of the first administrator, is decisive against the surety on the first administrator's bond as to the amount of his defalcation, and cannot be collaterally attacked in a suit by the second administrator against the bank in which the estate funds were deposited to recover moneys which the bank's negligence permitted the first administrator to embezzle.

The failure of the next of kin to ascertain that the estate was being misappropriated, where such failure did not mislead the surety on his bond, would not defeat a suit on such bond by the second administrator.

The second administrator of an estate, after a defalcation by the first administrator, by relying on his surety bond, did not thereby waive his right to proceed subsequently against the bank charged with participation in the misappropriation, even if, by agreement between them, the expenses of the suit were to be borne by the surety, and, if successful, the amount recovered was to be

EXECUTORS AND ADMINISTRATORS — Continued.

divided in certain proportions for its benefit and the benefit of the estate.

Where an administrator gave an agreement of indemnity to procure a contract of suretyship, the failure of the surety to enforce such agreement, the agreement being only for the protection of the surety, does not estop the second administrator from proceeding against a bank which participated by negligence in the first administrator's embezzlement of the funds of the estate.

Where a bank receives deposits of an individual, and also of an estate, naming such individual as administrator, and pays checks of the estate to the individual account to reimburse for overdrafts on individual account, the estate fund was not changed by the transfer.

A bank, knowing a fund on deposit is a trust fund, cannot appropriate it, or join in assisting others to appropriate it, without being liable, if the appropriation is a breach of trust. Page 141a, No. 1471.

FRAUDS, STATUTE OF:

An oral promise of a father to pay a debt due from his infant son is void under the statute of frauds. Page 73, No. 1434.

GOOD WILL:

An owner of a butcher business sold the business and fixtures in storeroom, and agreed not to enter into such business within twelve blocks thereof for two years. Within the prohibited area and time he advertised a butcher business as his own to be carried on under his name, followed by the word "manager." No one else publicly appeared as having any interest in the business. Held, that there was a breach of the agreement. Page 64a, No. 1427.

A bill of sale of a business recited that in consideration of a specified sum paid, the seller sold his butcher business and fixtures and tools located in a storeroom and that the seller would not enter into such business within twelve blocks of the building for two years. Held, that the consideration paid was a consideration for the sale of the business and fixtures, and for the agreement not to enter into a competing business. Page 64a, No. 1427.

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INSURANCE:

In an action on a fire policy, stipulating that it shall be void if insured conceals any material fact concerning the insurance or the subject-matter thereof, evidence held not to show any concealment in view of the fact that no inquiry was made by insurer about the matters alleged to have been concealed; "concealment" being an intentional withholding of any fact material to the risk, which the insured in good faith ought to communicate.

A concealment within a fire policy stipulating that it shall be void if insured conceals any material fact concerning the insurance of the subject-matter thereof, involves not only the materiality of the fact withheld and which he ought to have communicated, but also the design of the insured in withholding it; and the facts alleged to have been concealed must be material; and insured must have intentionally and fraudulently concealed them.

Where the materiality of facts withheld by insured in a fire insurance policy stipulating that it shall be void if insured conceals any material fact is not fixed by any writing, the materiality, together with the fraudulent intent of insured, must be determined by the jury from the circumstances.

Where insured in a fire policy stipulating that it shall be void for fraud by insured touching any matter relating to the insurance or the subject thereof, took out the insurance with a fraudulent purpose and speculative design of reaping pecuniary profit in the event of a loss, held, under the evidence, for the jury.

An insurer in a fire policy stipulating that it shall be void if interest of insured be other than conditional and sole ownership, seeking to defeat the policy for defects in title of insured, must allege and prove the same, and where insurer proved that a tax certificate was transferred to insured subsequent to the issuance of the policy, but failed to prove that insured was not the holder of the certificate when the policy was issued, it failed to prove that the tax certificate was outstanding against insured at the time the insurance was effected.

A purchaser in possession under a contract of purchase is the unconditional and sole owner within a fire policy though the purchase

INSURANCE — Continued.

money has not been paid in full; the purchaser not being in default.

A fire policy stipulating that it shall be void if the interest of the insured be other than unconditional and sole ownership, is not rendered void merely because of the issuance of a tax certificate creating, at most, a lien for taxes in existence in substance before the tax sale. Page 69a, No. 1431.

A stipulation in a fire policy that it shall be void if the interest of the insured be other than unconditional and sole ownership does not distinguish between a legal and an equitable estate in fee, but the latter is sufficient.

In an action on a fire policy issued and taking effect without any application therefor, an application for insurance made by insured to another insurer several days after the issuance of the policy sued on is inadmissible.

In case of doubtful meaning, a policy must be construed in favor of insured.

Forfeitures of policies are not favored, and a court will not declare a forfeiture by application.

A fire policy stipulating that insured shall within sixty days after fire render a statement, and that no action shall be brought on the policy until compliance with its requirements, and providing in separate clauses for forfeitures in enumerated instances, is not invalidated by insured's failure to make the statement within sixty days after a loss, but his failure merely postpones the time of payment, and does not defeat a recovery in an action commenced sixty days after the statement was furnished, and within twelve months after the loss. Page 69a, No. 1431.

Loss having been suffered under a hail policy, two separate adjustment papers were made out; one, signed by the adjuster and left with the insured, adjusted the loss to the several fields of grain at a per cent. of total loss on each field; the other, signed by the assured and the adjuster, as to which assured claimed his signature had been secured by fraud, adjusted the total loss in a lump sum. Held that, in the absence of fraud on the part of the adjuster, the two papers executed at the same time should be construed together, and when so construed, it being apparent that the

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INSURANCE — Continued.

naming of the lump sum was at best a mistake, the amount of the loss as itemized, field by field, in the other should control. Page 43a, No. 1414.

A stipulation in a fire policy for appraisal of a loss when required, as a condition precedent to an action on the policy, is valid, and when required is a condition precedent to an action for loss.

Though contracts of insurance are liberally construed in favor of the insured, he must comply with the plain provisions of the policy.

A fire policy, stipulating that insured shall have sixty days from the date of a fire to deliver proof of loss, and that the loss shall not become payable until sixty days after delivery of proof of loss, including an award by appraisers, where an appraisal is required, gives to insurer the right, at any time within sixty days after the delivery of proof of loss, to demand an appraisal. Page 120a, No. 1461.

Assent to the retention and deposit in bank by a purchaser of property of an employer of part of the price to await the outcome of an appeal by the employer from a judgment for damages for the death of an employee, in which a sufficient appeal bond had been filed, did not violate a policy of employer's liability insurance, which provided that "the assured shall at all times render to the company all co-operation and assistance in his power," in that it made the claim less easy to settle by inspiring confidence in the claimant of ultimate collection of the claim.

An offer by an indemnity company to pay an employer a pro rata share of an amount paid by the employer to discharge a judgment for an injury to a servant, with a refusal by the employer to accept anything less than the full obligation of the indemnity company, does not constitute an agreement to release the company from liability to the limit specified in its policy, and to permit the prorating of the amount paid.

Where a contract of indemnity insurance provided that the insured should not settle any claim without the consent of the insurer, contemplated only settlement of claims before trial, which did not reduce the amount of judgment below the sum which the insurer was obligated to pay.

INSURANCE — Continued.

A contract of indemnity insurance is to be construed the same as other insurance contracts, i. e., most favorable to the insured. Page 164a, No. 1488.

Provisions in the charter of a foreign life insurance company making a person who insures therein a member of the company, and fixing his interest at the amount of his insurance, give no right of recovery for death by legal execution for crime, where, under the laws of the place of contract, the policy does not cover a death so caused. Page 000a, No. 1487.

The holder of a valid policy of insurance upon his own life may make a valid assignment of the policy to a person having no insurable interest in the life of the insured, in consideration of a sum of money and an undertaking to pay the premiums due and to become due, and the assignee takes the entire interest in the policy, as against the personal representatives of the insured.

A clause in a policy of life insurance that any claim against the company arising under any assignment of the policy shall be subject to proof of interest does not diminish the rights of an assignee with no insurable interest, as against the personal representatives of the insured, if there is no rule of law to that effect, and the company sees fit to pay. Page 162a, No. 1486.

Death by a legal execution for crime is not covered by a policy of life insurance, though the policy contains no provision excepting such manner of death from the risks covered by it. Page 000a, No. 1487.

INSURANCE — PLACE OF CONTRACT:

A policy of life insurance, though executed at the company's office in Wisconsin, is a Virginia contract, where the application was made by a resident of the latter State at a place in that State, and the policy was delivered to him there, when he gave his note for the premium, which was payable at that place, and subsequently paid there, the policy providing that it should not take effect until the first premium should be actually paid. Page 163a, No. 1487.

Rev. St. (Mo.) which provides that any action against any insurance company to recover the amount of any loss under a policy of fire, life,

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INSURANCE — PLACE OF CONTRACT — Continued.

marine "or other insurance," the court may allow damages and attorney fees where it appears that such company has vexatiously refused to settle, is highly penal, and should not be held to apply to any company or class of insurance which is not plainly included therein.

In construing Rev. St. (Mo.) the fact that indemnity insurance was not in existence at the time of enactment may be considered in determining whether or not the general words include that class of insurance. The fact that the statute was amended in 1911 to include indemnity insurance is strong evidence that such insurance was not included in the original statute. Page 164a, No. 1488.

INSURANCE — SUBROGATION:

Where a loss by fire is occasioned to insured property by a wrongdoer and the loss exceeds the amount of the insurance, the insured owner is the only proper party to recover damages from the wrongdoer.

In such case, if the insured brings an action for the recovery of the loss from the wrongdoer and the insurer is informed of the pendency of the action, that the insured does not wish to represent the interests of the insurer, and that there is talk of a settlement between the insured and the wrongdoer, it is the duty of the insurer to intervene in the action, and protect his own interests.

Where in such case the insured accepts, on settlement, damages from the wrongdoer which added to the amount of the insurance, is less than the amount of his loss and expenses of litigation, the insurer, having made no effort to intervene, and protect his own rights, can recover nothing from the insured Page 66a, No. 1429.

A mortgagee of real estate has an insurable interest therein, and when he insures the property at his own expense and solely for his own benefit, the insurer, if obliged to pay a loss occasioned by injury to the property, may be subrogated *pro tanto* to the rights of the mortgagee under the mortgage. Page 68a, No. 1430.

INSURANCE — WAIVER:

A fire policy stipulated for an award by appraisers when required. Insured gave prompt notice of a loss. An agent of insurer notified an attorney of insured that the amount of the loss claimed was excessive, and demanded an appraisal. During the investigation, the agent made no response to a question put to him as to whether an appraisal was desired. Held, that insurer did not waive its right to an appraisal; a waiver, to be effective, must have occurred with full knowledge of all material facts, and must be distinctly made.

The insurer was not estopped from insisting on an appraisal; for, to create an "estoppel by conduct," the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied, except for such conduct. Page 120a, No. 1461.

A condition in a policy of life insurance that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company, and a breach of the condition may be waived. Page 162a, No. 1486.

INTEREST:

On specific performance of a contract to convey, the purchaser should not be required to pay interest from the date of a refused tender of payment. Page 119a, No. 1460.

LIMITATION OF ACTIONS:

Where a conditional promise is relied on to avoid a plea of limitations, performance of the condition must be shown, whether the promise is made before or after the statute has run.

A promise by a debtor to pay a debt when her father's estate is settled, if constituting an acknowledgment of the debt to avoid the defense of limitations, is conditional on settlement of the estate, and mere proof that the debtor has received from her father's estate a sum sufficient to pay the debt, in the absence of evidence of the amount of the bequest to her, is not proof of the performance of the condition, and the defense of limitations is not avoided; the word "settlement" involving a finality, and to "settle" a debt meaning to discharge it. Page 129a, No. 1466.

MISTAKE OF FACT:

One who pays money under a mistake of fact to one who is not entitled

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MISTAKE OF FACT — Continued.
thereto may sue to recover the money.
The rule that one who pays money under a mistake of fact to one not entitled thereto may recover it back is subject to the limitations that the mistake must arise in the transaction between the parties to the action, and there can be no recovery where by reason of the payment, the party receiving it has so changed his position, to his prejudice, that it would be unjust to require him to pay.
Where one under a mistake of fact pays money to another who does not share in the mistake, and who receives the money in good faith in the regular course of business and for a valuable consideration, he cannot recover back the money.
A third person purchased bonds from defendant, a stockbroker, and directed that they should be sent to plaintiff, also a stockbroker, who would pay for them. Plaintiff delivered a check to defendant in payment, relying on the third person's fraudulent misrepresentations. The third person was employed by plaintiff as a "customer's man" at a regular salary, but the third person was also engaged on his own account in the sale of bonds and unlisted securities, and in such transactions he sometimes "cleared" through plaintiff. Held that, after the payment of the check, plaintiff could not recover from defendant the money paid; the defendant not being chargeable with the fraud of the third person.
Where a stockbroker purchased bonds from another stockbroker through a third person fraudulently misrepresenting the facts to the former broker, who delivered to the latter broker a check for the price, and check was paid in the usual course of business without fraud or collusion, the former broker could not recover from the latter broker the amount of the check. Page 76a, No. 1436.

MORTGAGES:
A mortgage recited that it was on condition that plaintiff, who was indebted to the mortgagees in a certain sum, evidenced by a note of even date, "due after date with interest," should pay such moneys "at the times and in the manner aforesaid, and the above conveyance shall be null and void." Held, that the

MORTGAGES — Continued.
mortgage, in not naming any date for maturity of the debt, was so contrary to the ordinary course of business as to put an assignee thereof upon inquiry, which would have shown that the note was past due, so that he was not an innocent transferee for value.
If the assignee of a mortgage has notice that the second note was past due when he purchased the mortgage, he took it subject to any defenses available against the payee by the original maker. Page 146a, No. 1474.

MORTGAGES — INSURANCE:
Where insurance has been taken by the mortgagee of real estate at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor in case of loss is entitled to have the avails of the policy applied for his benefit toward the discharge of the indebtedness. Page 68a, No. 1430.

MORTGAGES — INSURANCE — SUBROGATION:
Where an insurance clause in a mortgage gave the mortgagee the option to take out insurance at the expense of the mortgagor, but did not compel him to do so, the mortgagee was at liberty to insure at his own expense and solely for his own benefit; and, in the absence of proof that the insurance effected was for the joint benefit of the mortgagor and mortgagee, or at the mortgagor's expense, except the fact that the insurance, in amount, was in excess of the amount due on the mortgage, it could not be held that the mortgagor was entitled to have the amount of the loss credited on the mortgage; and hence the insurer, having paid such loss, was entitled to be subrogated to the rights of the mortgagee. Page 68a, No. 1430.

MONEY PAID:
One who voluntarily pays the debt of another, or expends money on another's account without his consent, cannot recover, for no man can of his own volition make another his debtor. Page 152a, No. 1479.

NAMES:
Pub. Laws (Mich.) 1907, prohibiting the transaction of business under an assumed name, or any other than the real name of the individual conducting the same, unless such per-

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NAMES — Continued.

son shall file with the county clerk a certificate, setting forth the name under which the business is to be conducted, and the name of each of the owners, with their residences, and making a violation a misdemeanor, is a proper exercise of the police power to protect the public from imposition and fraud.

Pub. Laws (Mich.) 1907, prohibiting business under assumed name, unless a certificate is filed of the real name, residence, and address of each of its owners, and declaring a violation a misdemeanor, renders contracts made in violation of it unenforceable at the instance of the offending party only, but not as to parties who have dealt with the offenders in ignorance of their violation of the statute. Page 171a, No. 1493.

NEGLIGENCE:

In an action founded simply upon negligence, whether the injury was the natural and probable result of the negligence complained of is ordinarily a question of fact for the jury. Page 81a, No. 1439.

Where the danger to be anticipated is great, ordinary care may call for the highest vigilance and attempt to guard against it.

In an action for injuries to a street car passenger, required to alight from a car to board another car, evidence held to justify a finding of actionable negligence.

Whether the street car passenger was guilty of contributory negligence held, under the evidence, for the jury. Page 152a, No. 1479.

PARENT AND CHILD:

Plaintiff sold a piano to defendant's infant son, who did not state that he bought as agent, but merely stated that he had to consult his folks before buying. A receipt for part payment was issued to the infant in his own name, and plaintiff took the infant's own note for the balance, and brought suit thereon, which he discontinued when learning of the infancy. Defendant had paid for necessary articles for use on his farm bought by the infant son. Held, not to show that the son acted as the agent of defendant in making the purchase, or that plaintiff was justified in assuming that he so acted, precluding a recovery from him for the balance due. Page 73a, No. 1434.

PARENT AND CHILD — PRINCIPAL AND AGENT:

Where a son did not assume to act as the agent of defendant in a transaction, and he had no authority to act therein, there can be no ratification. Page 73a, No. 1434.

PAYMENT:

Where a contract for the payment of money is silent on the subject, the place of payment is the place where the contract is made; the debtor being required to seek the creditor at his domicile or place of business. Page 48a, No. 1418.

PAYMENT — DURESS:

Plaintiff having an option to purchase a lot of hogs from defendant, within a specified time, within the period of option resold a portion of them, but was then informed by defendant that he could not have the lot without paying a sum in excess of the contract price, and to obtain possession, in order to fulfil his contract with his vendee, plaintiff paid the sum demanded. Held, in an action by plaintiff to recover the excess, a question for the jury whether the conduct of defendant placed a restraint on plaintiff so as to destroy his free moral agency and whether plaintiff had ratified payment of the excess. Payment under constraint that takes away free agency, amounts to duress, irrespective of any manifestations or apprehension of force. A contract made under duress is not void, but voidable and may be rendered valid by ratification. Page 155a, No. 1482.

PAYMENT — DURESS — RATIFICATION:

Plaintiff, having an option to purchase a lot of hogs from defendant, resold a portion of them, after which defendant demanded a sum in excess of the contract price, which plaintiff paid in order to get possession.

Ratification of a payment made under duress in an action to recover the sum paid is an affirmative defense, and defendant has the burden of proof. Page 155a, No. 1482.

PLEDGES:

Possession must accompany a pledge, the pledge having a qualified ownership, but there may be a symbolic or constructive delivery of possession if it is as effectual against the general owner as a delivery of the property. Page 83a, No. 1440.

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PRINCIPAL AND AGENT:

An agent may not entrust his duties to another without his principal's consent. Any unauthorized delegation of his authority binds the agent and not the principal, even though the latter is benefited thereby. Page 34a, No. 1410.

One may make another his agent by ratifying the latter's assumption in a transaction, and thereby become liable to the latter and to a third person with whom the latter dealt; and such ratification may occur when a person, without authority in fact from his principal, pretends to represent the principal, and to employ a sub-agent, or may occur where there is no intermediary.

A ratification by a principal of the unauthorized acts of his agent may be shown by carrying out the contract made by the agent with another and accepting the benefits therefrom; but there can be no ratification without action by the principal, with knowledge of the facts.

Where one apparently clothes another with authority to represent him generally, or in a particular line of business, he is bound by contracts made by the latter within the scope of apparent authority, including the making of sub-agency contracts.

Whether one was the agent of another in the sale of corporate stock, so as to justify a recovery from the latter for services rendered, held, under the evidence for the jury.

Where the issue was whether defendant directly or through an agent employed plaintiff as agent to sell corporate stock, and there was evidence that a general agent of defendant, with authority to employ agents, or assuming to have such authority, employed plaintiff, who rendered services in selling the stock, and defendant claimed that plaintiff acted for the benefit of the corporation or the agent, and not for him, a charge that if plaintiff, without authority from defendant, made a contract for the benefit of defendant, who with full knowledge of the facts accepted the benefits, he was liable to plaintiff, but if defendant did not employ plaintiff, nor authorize anyone to employ him, and the contract made by plaintiff was not for defendant's benefit, and he did not ratify it, but it was for the benefit of the corporation, or of a third person, the verdict must be for defendant, sufficiently submitted the issue. Page 71a, No. 1432.

PRINCIPAL AND AGENT — Con.

If one holds another out to the world and accredits him as his agent, he is bound by that person's acts done within the scope of the agency thus given him. In such cases the question is, not what authority was intended to be given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in believing was given to him. Page 72a, No. 1433.

Where a contract between a retail piano dealer and defendant furnishing the money to pay for pianos procured from manufacturers obligated the dealer to pay the price to defendant, and interest thereon, out of the first moneys collected on contracts of sale made by the dealer as agent, but, with the consent of defendant, the dealer retained the first money paid on contracts as his compensation for selling, and also appropriated to his own use money belonging to defendant, the court could compel the dealer to account for the amount of the misappropriation, and give the dealer credit for commissions provided for in the contract. Page 61a, No. 1426.

Whether or not an act is within the scope of an agent's apparent authority is to be determined, under the foregoing rule, as a question of fact, from all the circumstances of the transaction and the business. Page 72a, No. 1433.

Knowledge acquired by an agent before the existence of his agency, or as to matters outside the line of his duty as agent, is not notice thereof to his principal; it being necessary, in order to bind the latter, that such knowledge be acquired in transacting the business of the principal.

Knowledge acquired by the agent in transacting the business of his principal is constructive notice to the principal, regardless of his actual knowledge; the agent being identified with the principal in law.

The rule charging a principal with notice of facts coming to the agent's knowledge in discharging the agency is not one of evidence, but of substantive law, though actual knowledge of the principal is a fact of evidence, and hence it is immaterial that through self-interest it is apparent that the agent will not in fact communicate his knowledge to the principal.

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PRINCIPAL AND AGENT — Con.

It is an agent's duty to inform his principal of every material fact within his knowledge upon the subject of his agency, which may affect the principal's interests, and it will be presumed that he has done so, but such presumption may be rebutted by showing that such information was not present in the agent's mind when executing the agency. Page 111a, No. 1457.

In an action for the specific performance of a contract for the sale of land entered into by vendor's agent, defenses that the agent exceeded his authority are affirmative and must be pleaded.

A real estate agent was given, by written contract, power to enter into written contracts for the conveyance of land owned by his principal. Held, that while Rev. St. (Mo.) required the agent to be authorized in writing to enter into contracts for a conveyance, such contract need not be recorded or acknowledged in accordance with section 2816, providing that every letter of attorney containing a power to convey real estate as agent shall be acknowledged and recorded.

Where an agent, having the power to sell land, entered into a contract providing that his principal should pay interest on earnest money deposited by the purchaser, the principal cannot complain that the agent thereby exceeded his authority, where the purchaser has made no claim for the interest.

As the law disregards small things, an agent's agreement to pay a very small interest on earnest money, deposited to bind a contract for the sale of land, will not invalidate the contract, though the agent was not authorized to agree to such payment.

Where a contract authorized real estate agents to contract for the sale of their principal's land by satisfactory deed, a contract of sale providing for the execution of a warranty deed was not in excess of the agent's authority.

Where a principal enters into a contract of agency, powers essential or usual to those granted are implied, but a substantial departure from both express and implied power will not bind the principal, and hence, where a principal gave an agent power to enter into a contract for the conveyance of land without fixing the date for the time of conveyance, the agent might fix the date.

A naked agency not coupled with an interest may be revoked, contrary to its provisions, and the revocation cannot be called in question by third persons. Page 166a, No. 1490.

PRINCIPAL AND AGENT — ESTOPPEL:

Where a principal has by his voluntary act placed an agent in such a situation that a person ordinarily conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. Page 72a, No. 1433.

PRINCIPAL AND SURETIES:

Sureties for some of the debts also secured by chattel mortgage, cannot require application of the mortgaged property to such debts; they cannot require the creditor to foreclose the mortgage upon condition broken; he may without their consent extend the statutory time for redemption and be held only for the value of the property at the end of the extension. Page 27a, No. 1405.

No agreement of sureties on a note, among themselves, that, if all of them were not bound, none of them should be, would affect the rights of the payee, unless he had notice of the agreement, and that it had been violated prior to or at the time that he took the note and parted with the consideration.

Where a note, when presented to the payee, had on it the names of five signers, four of whom were sureties for the principal maker, but the name of one of such sureties had been erased, the payee, in the absence of knowledge or notice to the contrary, was entitled to presume that such erasure had been made with the consent of the other sureties; the mere fact of such erasure being insufficient to put the payee on notice that it had been made without the consent of the other sureties, and released them from liability.

Where the payee of a note signed by four persons as sureties, before taking the note and parting with the consideration, had notice that the

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PRINCIPAL AND SURETIES — Con.

name of D., one of the sureties, had been erased without the consent of V., who had previously signed, and that he was not to be bound unless D. was, V. would be released; and if the subsequent signers signed after the name of D. had been erased such erasure would not of itself affect their liability, but if it was effective to release V., and it was agreed that such subsequent signers should only be bound on condition that V. remained, and the payee had notice of the fact at or before it took the note and parted with the consideration, then such release of V. would also release such subsequent signers. Page 53a, No. 1421.

An agreement by a creditor with the principal debtor, which extends the time of payment or suspends the right to enforce the debt without the surety's consent, discharges the surety.

A company executed its negotiable note, payable to its own order and signed by defendant as accommodation indorser, which note was indorsed to plaintiff, and before it was due the company wrote to plaintiff it would give its new note with its president's indorsement, to which plaintiff replied that it preferred to have defendant indorse them, and returned the notes for his indorsement. The company suggested that plaintiff hold the old note with defendant's indorsement "as collateral until the new notes are paid," and that the indorsement of its president had been left on the notes as proposed. Plaintiff retained the notes without replying. Held, that the agreement did not reserve plaintiff's right to proceed against defendant on the old note, so that defendant was discharged; Negotiable Instruments Law, providing that one secondarily liable is discharged by any agreement by the holder to extend the time of pay ment or postpone his right to enforce the instrument, unless the right of recourse be expressly reserved.

The obligation of a surety such as an accommodation indorser will not be extended beyond its strict terms. Page 169a, No. 1491.

PROPERTY:

Ownership of personalty is presumed from possession. Page 83a, No. 1440.

QUASI-CONTRACTS:

Where a contract for services has been performed, and the wages only remain to be paid, the common indebitatus asumpsit count for work and labor lies for the recovery of the wages, though generally, where there has been a special agreement, the parties must resort thereto. Page 74a, No. 1435.

RAILROADS:

A common carrier is not required by the common law to provide passenger or freight depots, but may be required to do so by statute. Page 59a, No. 1425.

The Railroad Commission must have express authority for its acts under the Railroad Commission Act, as no authority will be implied. Page 59a, No. 1425.

Railroad Commission Act (Ore.), § 12, requires every railroad to furnish reasonably adequate service, equipment, and facilities, and section 28 provides that upon complaint that any service in the transportation of persons or property is inadequate notice must be given the company complained of which may file an answer, whereupon a hearing shall be ordered; and, if it be found that the service is inadequate, the commission may make a reasonable order as to the service. Held, that the Railroad Commission, upon proper investigation, may make an order requiring a railroad company to erect a passenger waiting room and freight depot at its station.

The Railroad Commission may require a railroad company to maintain an agent at the depot to enable the public to transact business with him; the word "service" as used in the act including the maintenance of a station agent.

In an action by the state against a railroad company for a penalty for a violation of an order of the Railroad Commission requiring the erection of a passenger and freight depot, evidence that defendant had not employed any one at the station with whom shippers could negotiate for transporting freight was admissible. Page 59a, No. 1425.

The words "regular station," as used in Railroad Commission Act (Ore.), § 22, requiring every railroad to provide and maintain adequate and suitable depot and toilet buildings at its regular stations where an agent is maintained, means a place established on the road where trains

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RAILROADS — Continued.

are regularly stopped to receive and discharge passengers and freight, and where the carrier keeps an agent for the transaction of business, so that, in an action against a railroad company for a penalty for failure to construct a depot building pursuant to an order of the Railroad Commission, it may be inferred, from an averment that the station is a "regular station," that defendant maintains an agent there.

Since Railroad Commission Act (Ore.), § 31, provides that any service prescribed by the commission shall be *prima facie* reasonable; until found otherwise in an action for that purpose, the reasonableness of an order of the Railroad Commission prescribing service can only be assailed in a proceeding under section 32, authorizing any railroad affected by an order of the commission to commence suit against the commissioners to vacate the order, on the ground that the service required is unreasonable; so that, in an action by the State against a railroad company for a penalty for noncompliance with an order requiring the erection of a depot, the complaint need not allege that the erection and maintenance of a depot was essential, nor state the volume of railroad business transacted at the station, since the order of the commission, not having been vacated, established *prima facie* the reasonableness of such service. Page 59a, No. 1425

REFORMATION OF INSTRUMENTS:

While the reformation of a contract involves its attempted enforcement as reformed, rescission only involves the abandonment of a contract which the parties did not intend to make, and, while a party cannot have a contract reformed for a mistake which is not mutual, he can have it rescinded for a mistake on his part only; there being no contract because of a want of meeting of the minds of the parties. Page 124a, No. 1463.

SALES:

A retail piano dealer and a third person may enter into a contract whereby the third person shall pay manufacturers for pianos procured, and obtain title to them, to be sold by the dealer as agent; and the ignorance of the manufacturer does not affect the rights of the parties and those dealing with them. Page 61a. No. 1426.

SALES — Continued.

Where, in a defense to a suit on promissory notes, the defendant pleads that there has been a total failure of consideration, because the notes were given for a machine which, by reason of defects, was wholly worthless; and the defendant has testified that it was worthless because, at the time the suit was filed, the machine was so out of fix that it could not be operated, it is proper for the court to admit testimony tending to show that the machine had been repaired, and had been successfully used and operated, since the suit was filed. The fact that a machine may not be capable of operation without repair does not necessarily render the machine totally worthless, and the fact that it did successfully operate when the repairs were made, irrespective of the time when they were made, tends to show that the machine was not in fact without some value. Page 80a, No. 1438.

Where there is a special contract of sale, and the contract has been breached by the seller to the injury and damage of the purchaser, he may set up the contract and its breach and the damages sustained resulting as a proximate consequence of such breach by way of set-off to the claim for the value of the goods, but a party may not purchase and retain the goods of another, and, when sued for their value, set up a breach of contract in the sale and purchase to defeat payment. Page 123a, No. 1462.

The unconditional delivery by a seller of goods to a common carrier, to be transported and delivered to the purchaser, to whom the bill of lading was sent, constituted a delivery to the purchaser, which passed the title, even though the purchaser had not accepted the goods at the time a receiver in insolvency was appointed for it, who received them in its behalf.

A "sale" is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before

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SALES — Continued.
the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise. Page 126a, No. 1464.
The passing of title to an article sold ordinarily depends upon the actual intention of the parties; and if they intend to pass title an actual change of possession of the goods is not essential to invest the buyer with title.
If there is a valid unconditional sale, with an understanding by both parties that the title to the property, which is then present, shall pass to the buyer, the sale is complete, though the seller retains actual possession of the property as bailee of the buyer. Page 172a, No. 1494.
Between the parties to a sale of specific goods, especially where the price has been paid, a presumption arises that the title has passed, without a delivery of the goods.
Such a presumption does not ordinarily arise as against creditors or innocent purchasers from the vendor; but as to such third parties there must be not only a formal delivery to the vendee claiming the goods, but there must be an actual and visible change of possession.
Where a commercial transaction, which should ordinarily be completed promptly, is not completed within four months, and neither party has done anything within that time to complete the same, either party may treat the contract as rescinded. Page 173a, No. 1495.

SALES — BILLS AND NOTES:
Where on a delivery of property a check is given in payment, and the drawer, drawee, and payee all live in the same city, so that it may be presented at once, in the absence of an agreement or understanding to the contrary, the drawer must be held to represent that the drawee is already in funds to meet it, and, if not, the payee may rescind the sale and reclaim the property. Page 55a, No. 1423.

SALES — FAILURE OF CONSIDERATION:
Where a defendant, upon being sued upon a promissory note, pleads that it was given for the purchase price of certain personal property, as to which there was a failure of consideration, because of certain latent defects undisclosed, it is error for the court to charge the jury that the defendant could not successfully assert failure of consideration without showing that he had offered "to restore the plaintiff to his former status within a reasonable time" from the moment he discovered the defects. Page 80a, No. 1438.

SALES — RESCISSION:
Where a seller sold and shipped at different times eight car loads of veneer to a furniture company on credit, having been informed by the company before any sale that it was continuing its business only by virtue of an extension of time by its creditors, there was no such fraud or misrepresentation as entitled the seller to rescind the sale and reclaim the last car load, which was the only one unpaid for, on the appointment of a receiver for the purchaser. Page 126a, No. 1464.

SALES — WARRANTY:
It being implied as a part of an executory contract of sale that the goods will be of merchantable quality, if they are not, the purchaser has a right to rescind.
On the failure of a buyer to return or offer to return the goods, it will be conclusively presumed that the goods were fit and suitable, or, at least that he was satisfied with their quality.
Where a buyer on rescinding a contract of sale makes his offer to return the goods subject to the condition that the seller shall reimburse him for express charges paid, there is no valid tender, and hence no rescission of the contract. Page 128a, No. 1465.

SET OFF:
The maker of a promissory note, not due for more than a year, may purchase it, a definite day being fixed for payment of the price; the maker of a note net yet due, contracted with the seller to purchase it at a discount, and the seller attempted to collect the full amount, the maker could set off damages arising from breach of contract in the action brought by the holder of the note. Page 1, No. 1389.

SPECIFIC PERFORMANCE:
Where vendor and purchaser have agreed that the purchaser might

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SPECIFIC PERFORMANCE — Con.

pay a purchase-money note secured by mortgage, or at his option within a year require the vendor to repurchase, or to cancel the note and the mortgage of record, on the vendor's refusal to either repurchase or cancel the mortgage, equity will decree specific performance of the agreement of the parties to remove a cloud upon the purchaser's title to the property.

In an action by the purchaser of land, who had paid for it in part by notes secured by mortgage thereon, and who under the express provisions of the note and the mortgage together had an option to pay the note, or to require the vendor, on "thirty days' notice in writing of their desire to sell under the terms of this agreement," to repurchase the land, a complaint which avers as to notice that a notice in writing was prepared, issued and signed by the purchasers, without averring that such notice was issued to the vendor, but only that it was issued, is bad on demurrer. Page 114a, No. 1458.

While the chancellor has a discretionary duty in decreeing specific performance, his discretion is a legal one, and relief cannot be denied where the contract is fair and equitable, and so a purchaser of land whose contract is fair and equitable may have specific performance regardless of his remedy at law. Page 166a, No. 1490.

STATUTES:

A street railway corporation which desired a crossing over a railroad entered into a contract with the railroad securing it. The street railway company then became insolvent and a new company purchased its assets, being given a new franchise by the municipality in which it operated. Held that, despite the new franchise, its rights were fixed by the original contract under which it succeeded to the crossing. Page 152a, No. 1479.

STOPPAGE IN TRANSIT:

The owners of goods shipped to a bankrupt, removed from the vessel to the custom house, freight and duty unpaid, entitled to right of stoppage in transit: freight paid and duties unpaid, the transit was terminated and the goods were not subject to stoppage. Page 35a, No. 1411.

STREET RAILROADS:

A commissioner's deed on foreclosure sale of the property of a street railroad company, which covers the company's right of way, equipment, privileges, rights, appendages, and appurtenances, will include an easement of right of way over the tracks of a steam railroad company under a contract between the latter and the mortgagor, though not specifically mentioned.

Where one corporation goes entirely out of existence by being merged into another, the surviving corporation is entitled to all the properties and answerable for all the liabilities of the other, and so, where a street railway corporation, entitled to a crossing over a railroad company is merged into another, the survivor takes it subject to all liabilities. Page 152a, No. 1479.

STREET RAILROADS — EASEMENTS:

A purchaser on foreclosure of the property of a street railroad company having knowledge of the rights of a railway company in a crossing over its property takes no greater right than the street railroad company. Page 152a, No. 1479.

STREET RAILROADS — GRANTS:

Where a railroad company granted a street railway company the right to build a crossing over its tracks, and the contract provided that the street railway company might make any additional crossings that might become necessary in consequence of additional tracks being laid by the railroad company, the additional crossings were those over any new tracks which the railroad company might lay in the future years, and were not limited to additional tracks located before the crossing was made. Page 152a, No. 1479.

SUBROGATION:

After the difference between the penalty of an administrator's bond and the amount of the probate decree, fixing his defalcation, with the costs of recovery, were satisfied from proceeds recovered by the second administrator from a bank in which the first administrator had made deposits, the surety would be subrogated to the excess, and could enforce such right by suit. Page 141a, No. 1471.

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SUNDAY:

The sending of a telegram by a husband to his wife, notifying her he would not return as expected, is a "work of necessity," within Burns' Ann. St. (Ind.) 1908, § 2364, prohibiting any work on Sunday, save that of charity and necessity.

A contract entered into by a telegraph company, on Sunday, to transmit a necessary message, is only voidable, and advantage of that defense may be had only by answer.

In an action against a telegraph company for failure to promptly deliver a message sent on Sunday, a general finding for plaintiff is equivalent to a finding that the contract was not in violation of Burns' Ann. St. (Ind.) 1908, § 2364, prohibiting ordinary labor on Sunday. Page 131a, No. 1467.

TELEGRAPHS AND TELEPHONES:

Where a telegraph company receives a message for transmission, it must, if the message shows necessity for speedy delivery, send it promptly, but the telegraph company does not insure speedy transmission, and is only bound to exercise ordinary care and diligence in the transmission of messages, and is not responsible for delays due to causes over which it has no control, or which it could not have remedied in due time by the exercise of ordinary diligence.

In an action against a telegraph company for delay in transmission of a message, where there was evidence tending to show that the wires had been torn down by a railroad, and that the telegraph company had knowledge of this fact before accepting the message, but did not repair the wires until twenty-four hours after notice of the wire trouble, it was proper to submit to the jury an instruction upon the liability of the telegraph company for negligent delivery.

A telegraph company which failed to inform the sender of a message that it could not be speedily forwarded, owing to defects in the line, is liable in damages for delay of the message. Page 81a, No. 1439.

In an action against a telegraph company for delay in transmission of a message sent to apprise plaintiff of his wife's desperate illness, evidence held to warrant the jury in finding that defendant's failure to inform the sender of its inability to promptly transmit the message was the proximate cause of plaintiff's failure to reach his wife before her death.

Where a husband took his wife to a hospital about seventy-five miles from his home, and left her there to return to his business, knowing that the wife was desperately ill, though the doctor told him that she had a chance to recover, an award of $2,000 damages against the telegraph company for its failure to deliver a message in time for the husband to reach his wife before her death is excessive, and will be reduced to $1,000. Page 81a, No. 1439.

TRADEMARKS AND TRADE NAMES:

Unlawfulness, arising from a corporation practicing medicine, does not preclude it from enjoining unfair competition in a separate enterprise for the manufacture and sale of proprietary medicines.

One is not entitled to sell his products or goods as those of another by means of unfairness, artifice, misrepresentation, or fraud.

Defendant will be enjoined from using the words "Dr. Pierce," or the word "Pierce," without prefixing his Christian name or the initials, in advertising, labeling, etc., proprietary medicines, where otherwise his remedies would be confused in the public mind with those of a long-established and well-known competitor, and where defendant is not a licensed physician; but he may use his own name, if deception be obviated. Page 132a, No. 1468.

UNIFORM SALES ACT:

Adopted by New York, England and several of the States and its general enactment is expected. Page 38a, and at the end of this issue.

USURY:

Hurd's Rev. St. Ill. 1909, c. 74, § provides that when any written contract, wherever payable, shall be made in Illinois or between citizens or corporations of that State, or a citizen or corporation thereof and a citizen or corporation of any other State, or shall be secured by a mortgage or trust deed on land in the State, such contract may bear any rate of interest allowed by law in Illinois, not exceeding seven per cent. per annum, and if any person or corporation shall contract to receive

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USURY — Continued.

a greater rate of interest than seven per cent. on any such contract, he shall forfeit the whole of such interest, and only be entitled to recover the principal. Held, that such section applies only to cases where the rate of interest that may be charged by the law of the State or county where the contract has been made is less than the rate that may be legally charged in Illinois in order to sustain its constitutionality, and hence did not apply to or render illegal a Missouri contract for the payment of money bearing eight per cent. interest which was not usurious in Missouri, and this notwithstanding the fact that its performance was secured by a mortgage on Illinois land; the mortgage being a mere incident to the agreement.

Where plaintiff sued on a note made and payable in Missouri, and defendant pleaded that the contract was usurious, the burden was on defendant to show that the contract was unlawful, and plaintiff was not bound to plead the Missouri interest statute in order to authorize its admissibility. Page 44a, No. 1415.

VENDOR AND PURCHASER:

The title of the purchaser in a contract for the sale of real estate is equitable, embracing full ownership in fee, and the vendor holds the legal title in trust for the purchaser; and, where the purchaser is in possession, the vendor may not convey the legal title to another free from the trust. Page 69a, No. 1431.

Under Civ. Code (Cal.), § 1489, permitting a tender to be made at a creditor's residence if he evades the debtor, where a vendor evades the purchaser to prevent a tender of performance, the tender may be made at the vendor's residence.

Evidence held to show evasion by the vendor under a contract to convey, of a tender of performance by the purchaser, permitting a tender at the vendor's residence under Civ. Code (Cal.), § 1489.

An agreement by the grantee of an option to purchase land to bear a share of the expense of farming the land during the term of the option is sufficient consideration to support the option.

Under Civ. Code (Cal.), § 1605, making any benefit to which one is not lawfully entitled sufficient consideration for a promise, an agreement to extend an option to purchase land is sustained by the grantee extending the time for settlement by the grantor of an account arising under the original contract. Page 119a, No. 1460.

Where the entire purchase price of land was tendered to the vendor, he cannot complain that part of it was improperly paid to his broker in the first instance. Page 166a, No. 1490.

WAREHOUSEMEN:

A "warehouseman" is one who for business and for hire keeps and stores the goods of another. Page 83a, No. 1440.

Pledges of so-called warehouse receipts against pledgor's whiskey stored in his own warehouse are invalid; there being nothing about the whiskey to indicate that any one else had any interest in it excepting the government's interest in payment of taxes. Page 83a, No. 1440.

WAREHOUSEMEN — PLEDGES:

A pledge of warehouse receipts symbolically passes possession to the pledgee. Page 83a, No. 1440.

WORK AND LABOR:

Where either party to a contract for services has partially performed, but has been prevented from completing the work by the default of the other party, the party prevented may recover on the common counts and in *quantum meruit* for his partial services up to the time he was stopped, and obtain a payment for the reasonable value of the services. Page 74a, No. 1435.

Where, in an action by a building contractor, suing for the reasonable value of the work done up to the time he was prevented by the owner from completing the work, the issue was whether the owner had paid for all the services rendered, the contract could not be considered by the jury in determining the question.

Where, in an action by a building contractor for the reasonable value of services rendered and materials furnished up to the time he was prevented by the owner from completing the work, the evidence showed that building material prepared by the contractor were used by the

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WORK AND LABOR — Continued.
owner after the contractor quit work, the jury, in determining the right of the contractor to recover, need not consider whether he made the materials according to the specifications annexed to the contract. Page 74a, No. 1435.
A party who has performed labor and furnished materials in the construction of a house under contract, unenforceable by reason of Pub. Laws (Mich.) prohibiting the doing of business under an assumed name, cannot recover therefor, since the statute recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff. Page 171a, No. 1493.

WORK AND LABOR — QUASI CONTRACTS:
Where the contract is entire, the general rule is that, if the plaintiff has failed to perform the whole on his part, he can recover nothing, for, being entire, it cannot be apportioned; but if the part performance of a contract is beneficial to the promisee and has been accepted by him, though the other party can maintain no action upon the original contract, his part of which he has failed to perform, yet he may maintain a general assumpsit for the actual value of his labor and materials which the promisee has accepted and enjoyed. Page 123a, No. 1462.

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McMASTER'S COMMERCIAL CASES

CURRENT BUSINESS LAW

FROM THE REPORTS OF THE HIGHEST COURTS OF THE SEVERAL STATES

Accord and Satisfaction.

We have hitherto discussed at some length the doctrine of accord and satisfaction, laying particular emphasis on the requisites of a valid accord which would be a bar to any action on the original cause. We stated that an accord must never be executory, but must always be executed. In other words, when two parties agree to settle a cause of action they must do more than merely *agree* to settle, they must *settle*. Otherwise either party may sue on the original cause of action notwithstanding the agreement to settle. An example may serve to illustrate the strictness with which courts apply this rule. A claims that B owes him $100. This B denies. They agree, however, that A will cancel all claim and B will give A a picture worth $20, a watch worth $30 and $5 in cash. B actually gives to A the picture and the watch, but before he has paid the $5 A repudiates the settlement and sues B for the $100. This the law on the strength of the rule we are discussing allows him to do. Of course he must first return the watch and picture to B. This principle of law is reaffirmed in Bell v. Pitman, Decision No. 1389.

This case, however, draws attention to an exception, or, rather, a qualification of said rule. Where the agreement in itself is agreed to be received as a settlement, the courts will respect and enforce the agreement of the parties, and the new agreement will then, even before it is performed, constitute a bar to any action on the original cause. The tendency of the courts, however, is against construing such an accord as being executed unless the intention of the parties that the new agreement in itself should constitute satisfaction is very clear. If such intention is made manifest, however, the courts will give it

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effect. In Bell v. Pitman the court, after affirming the rule that an accord to be effectual as a bar must be executed, goes on to say:

"While this is true, there is a well-sustained exception to the rule, which is thus stated in 1 A. & E. Enc. of Law and Practice, 642, as follows: 'It is an apparent, rather than a real, exception to the rule requiring the accord to be executed, that where a promise or new contract founded upon a new consideration is itself accepted in satisfaction of the contract or claim, there the accord and satisfaction is good without performance. But it must appear that the plaintiff accepted the agreement alone in satisfaction and discharge of his cause of action.' Thus in Peace v. Stennet, 4 J. J. Marsh 499, Peace pleaded that he had executed a note to Stennet, which Stennet had accepted in satisfaction of the claim. It was held that the plea was sufficient, although the note had not been paid. In Tomlin v. McChord, 6 J. J. Marsh. 1, McChord sold a tract of land to Tomlin, and he executed to McChord a note for $200, to be paid on certain conditions. When sued on this note, Tomlin pleaded that subsequently they had made an agreement by which he had executed a note to McChord, payable on other conditions, in compromise of the note sued on. It was held that the plea was good. In Price v. Price, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529, 23 Ky. Law Rep. 1086, 1911, the plaintiff held a note on the defendant for $4,000, and, when sued on the note, he pleaded that it had been agreed between them in writing that he should pay the plaintiff $62.50 every three months during his natural life, and that this should be in full of the $4,000 note. The defense was sustained."

In considering this modification of the rule it is well to remember an intimation in a late case in the New York Court of Appeals to the effect that the new agreement, in order to constitute a bar of itself and without performance, must contain the recognition of some disputed right of the person who is endeavoring to recover on the original cause of action.

All of the difficulties and technicalities which the courts have thrown around this subject make it necessary for one not a lawyer who wishes to be on the safe side not to rest until everything agreed to be done by way of compromise is actually performed down to the minutest detail at the earliest possible moment.

See Decision No. 1389.

Accord and Satisfaction: Check "In Full Settlement."

At page 17a of the October, 1910, Quarterly, we discussed the effect of the retention of a check marked "In full settlement." We there stated that generally such retention acted as a settlement and the creditor could not claim that a larger amount was due. The law does not lay this down absolutely, but merely states this to be the intention of the parties. Hence, as we stated in discussing Decision No. 1298,

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anything which clearly shows that the intention of the parties was that the check should not operate as a settlement will control and prevent the operation of the general rule. While this is true, nevertheless it is extremely unsafe for any one to retain a check marked as above described unless he be satisfied to accept it as a settlement in full.

This will become the more apparent from a consideration of the facts in Cunningham Commission Co. v. Rauch-Darragh Grain Co., Decision No. 1390. In that case defendants, after some discussion, sent to plaintiffs a check for $250.73, marked on its face as in full settlement of all defendant's indebtedness to plaintiff.

Immediately upon the receipt of the check the plaintiff wrote to the defendant this letter:

"Little Rock, Ark., October 25, 1905. — Rauch-Darragh Grain Co., City — Gentlemen: Your check for $250.73 received and applied to your credit. We wish to advise, however, that we do not accept same as settlement, as there are a number of items that you will not agree to. We will check your statement within the next few days and advise you concerning same. Yours, etc., Cunningham Commission Company."

Defendant never answered this letter.

Despite this, however, it was held that the plaintiff was bound by the acceptance and retention of the check so marked and could not maintain any suit for any excess of indebtedness. The court said:

"The check contained the statement upon its face that it was in full payment, and the plaintiff testified that immediately on its reciept the above letter was written, which shows that the plaintiff understood that the check was sent and tendered upon condition that it should be received in full payment. The plaintiff with this knowledge retained and cashed the check. This, we think, amounted to an accord and satisfaction. The case, we think, is ruled by the case of Barham v. Bank of Delight, 126 S. W. 394, 27 L. R. A. (N. S.) 439. In that case we hold that, when a debtor sends a check to his creditor to apply upon a disputed claim bearing on its face a statement that it is a payment in full, the retention and collection of the check by the creditor renders it an accord and satisfaction of the debt.

"It is urged by counsel for plaintiff that there was no accord and satisfaction in this case because the plaintiff immediately on receipt of the check wrote the above letter to defendant, in which it stated that it did not accept the same as a settlement of the indebtedness. But in the same letter it is stated that the check was received and applied to the credit of the account. It thus indicated that it had appropriated the check, and would not in any event return same to defendant.

"It is urged by plaintiff that it was incumbent upon defendant to answer this letter, and state that it did not agree to permit the check to be only applied as a credit upon the indebtedness, if it did not consent thereto. But we do not think that a reply was necessary. The

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plain import of the language of this letter indicated that the plaintiff had received and retained the check and had appropriated it on the indebtedness. There was nothing in the letter which indicated that they would return the check if it was so desired by the defendant. If the plaintiff had intended to return the check in the event the defendant had not desired to consent to it being placed only as a credit on the account, then it should have stated so in apt language. Its conduct shows that this was not its purpose, for, in addition to stating in the letter that it had applied the check to the credit of the account, it did actually cost same. But, as stated in the case of Barham v. Bank of delight, *supra:* 'If an offer of payment was made upon condition, and the plaintiffs so understood it, there was but one of two courses open to them: Either to decline the offer and return the check, or to accept it with the condition attached. The moment plaintiffs indorsed the check and collected it, knowing that it was offered only upon a condition, they thereby agreed to the condition and were estopped from denying such agreement. It was then that the minds of the parties met, and the contract of accord and satisfaction was complete in law.' The chancellor made findings of fact as above indicated, and we think that they were well supported by the testimony adduced upon the trial of the case."

See Decision No. 1390.

Bankruptcy: Preferences.

Under the Federal Bankruptcy Act any preference made by a bankrupt within four months prior to the filing of the petition for adjudication as a bankrupt is voidable and may be set aside. As we have hitherto seen, the courts have interpreted very strictly the requisites for such a voidable preference. It must be made while the maker is insolvent, it must be intended by him to constitute a preference, the receiver of the preference at the time of receiving must know that a preference is intended or the circumstances must be such that a reasonable man would suspect such intent, and, finally, there must actually be a preference, *i. e.*, a payment in whole or in part to one creditor to the endangering of other creditors of the same class. These requisites are restated in the late case of In re Sayed, Decision No. 1391, where it is said:

"It is elementary to the definition of a forbidden preference, considered under any section and for any purpose, that it must have been made by the debtor 'while insolvent.' A solvent debtor cannot make a preference. It is, therefore essential to the argument of the trustee that the transfer of the land contract to the bank was not 'made' in 1907, when it was signed and delivered, nor in 1908, while the bank was making advances on the strength of it; and, indeed, that it had never been 'made' down to the date of the adjudication, because it was not recorded until after adjudication. I cannot adopt this theory. This transfer was absolutely and completely made in July, 1907, and all the incidents of security for the amount now due

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had attached as early as March, 1908, and during all this time Sayed was perfectly solvent, and had a right to give such a security and the bank had a right to receive it.

"Carrying the same inquiry a step further, we find that the intent to give a preference — that is, to pay one creditor, leaving other creditors in danger of not being paid as fully — must exist on the part of the giver of the security at the time it is given, and the receiver must then have cause to believe that the giver has such intent."

This decision draws attention to a further element necessary to the constitution of a preference — the preference must be over creditors of the same class. Hence a giving of security for a present loan can under no circumstances ever constitute a preference within the meaning of the act over already existing creditors. The justice of this is obvious. The prior creditors are not injured in any way by the giving of such security, provided of course it be given in good faith and be not disproportionate, since the new loan, presumably at least, goes into the estate of the bankrupt, and hence indirectly enriches his creditors, who in turn can always have the advantage of the pledged securities by a return of the amount of the loan. The case is thus entirely different from that where an insolvent gives security to one of two existing creditors. It is such a transaction which the Bankruptcy Act deems a voidable preference. On this additional requisite of a preference the court, in the case we are discussing, says:

"A security is not a preference, unless it puts one creditor ahead of others of the same class, and one who receives security in exchange for a present loan is not one of the same class as an existing creditor. Hence a security given for a present loan is not a preference, no matter how insolvent the creditor may be. In this case, $200 of the amount was loaned at the time the assignment of the contract was given. There was an indefinite agreement to make further loans on the same security, and further loans were, from time to time, made, all while the debtor was solvent and all while there was no obligation under the bankrupt law for any recording. Each time that the bank was requested to and did advance an additional amount, it did it on the strength of the security which it already had received in contemplation of such future advances, and it seems to me that each such advance is, in substantial effect, a loan in exchange for present security. Each time by virtue of the transaction the bank contemporaneously received an additional interest in the security. In March, 1908, each fraction of the total existing loan had been paid over upon the faith of security received ir attaching at the time of the advance. I do not think this situation is at all changed by the fact that the old bank transferred the loans and the security to the new bank, and that the new bank afterwards took a new assignment, somewhat more formal, but which did not change the rights of anyone."

It should be unnecessary to add that if there be any fraud or double dealing in such loan the whole transaction may be set aside.

See Decision No. 1391.

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Bankruptcy: Acts of Bankruptcy: General Assignments.

In the preceding note we have been considering a preference as a voidable transaction which may be set aside by the trustee in bankruptcy for the benefit of the body of the creditors. In addition to such aspect, however, a preference constitutes an act of bankruptcy, *i. e.*, one of those acts on the proof of whose commission the court will declare a party a bankrupt.

Another act of bankruptcy is a general assignment. To constitute such act the assignment must be what its name indicates — general, covering all the property which the assignor possesses. If one be actually insolvent and while in such state makes a general assignment he has committed an act of bankruptcy and may, on petition and proof, be adjudicated a bankrupt. It is needless to say that the insolvency is just as necessary an element as the assignment. The assignment, moreover, need not be in any set form. Anything which expresses the intention to make a general assignment is sufficient. Indeed an assignment under certain conditions may in itself be unenforceable and ineffectual and yet nevertheless it may constitute an act of bankruptcy. So it is held in a recent case, In re Federal Lumber Co., Decision No. 1392, where the court, in dealing with the nature of a general assignment as constituting an act of bankruptcy under the Bankruptcy Act, says:

"It is true that a general assignment may be made without a formal deed of assignment. Thus in Re C. H. Bennett Shoe Co. (D. C.), 140 Fed. 687, the stockholders of the corporation signed an agreement, and an appointment such as under the laws of Connecticut had the effect, and was understood by them to have the effect, of assigning its property to its directors, and making its trustees to wind up its affairs. Thus in Re Salmon (D. C.), 143 Fed. 395, part of the alleged bankrupts' property had been taken charge of by a state official, according to the provisions of certain State laws, for the benefit of all their creditors and, the bankrupts having thereupon conveyed to the same official the remainder of their property for the benefit of all the creditors, it was held that the two transactions together amounted to a general assignment. And thus in Re Thomlinson Co., 154 Fed. 83, 83 C. C. A. 550, a bill of sale of all the bankrupt's property conditioned that the grantee should sell or convert it into money, pay all the creditors pro rata with the proceeds and return the surplus, if any, to the grantor, was held to amount to a general assignment. In all such cases, however, what was done was done with the intent that it should effect a present transfer of all the grantor's property.

"It is true also that if a grantor makes for the benefit of his creditors what purports to be and is intended by him to be a general assignment, and is accepted as such by the assignee named, this will be none the less an act of bankruptcy though invalid for some purposes. Re Meyer, 98 Fed. 976, 39 C. C. A. 368, and, under Act March 2, 1867, c. 176, 14 Stat. 517, Re Mendelsohn, 3 Sawy. 342, Fed. Cas.

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No. 9,420; Re Lawrence, 10 Ben. 4, Fed. Cas. No. 8,133. In Griffin v. Dutton, 165 Fed. 626, 91 C. C. A. 614, the Court of Appeals for this circuit held an assignment so made and accepted an act of bankruptcy, though neither the form in which the bankrupt had signed it nor the signature of the assignee could be proved with certainty, the instrument itself having been lost, and though no creditor had assented to it. In Canner v. Webster Tapper Co., 168 Fed. 519, 93 C. C. A. 541, the same court held such an assignment an act of bankruptcy, though the assenting creditors repudiated it and were held to have the right to repudiate it because their assent had been induced by fraud and misrepresentation.

"But in all the above cases the grantor had gone far enough to make what had been done a transfer of all his property, so far as his part in the transaction was concerned. If he had stopped short of that point, however clearly he may have manifested his intention to make a general assignment, he cannot be said to have made any. He may have prepared a deed of assignment with intent to execute it, but, so long as he has left it unsigned or in escrow, the general assignment contemplated has not been made."

See Decision No. 1392.

Banks and Banking: Deposits.

In Ingber v. Tradesmen's Nat. Bank, Decision No. 1393, the plaintiffs were executors of one Jacob M. Ingber, who in his lifetime had a deposit account with defendant. In the course of business Ingber, from time to time, became indebted to defendant, and it was finally agreed between him and the bank that he should draw his checks to the order of the bank for $3,000, have them certified and deliver them to the bank as collateral security for any indebtedness he might owe the bank. In the meantime Ingber died, his two certified checks to the amount of $3,000 being still outstanding and in possession of the bank. His executors claimed that this $3,000 belonged to his general estate and should be turned over by the bank. The bank claimed in effect that the drawing of the checks constituted an assignment of the account to it to the extent of $3,000 and that therefore the bank could hold on to this balance. The court upheld the contention of the bank, saying that the $3,000 was really not in the account of Ingber at the time of his death, since the certification of a check charges the account with the amount thereof and thereby deducts such amount from any balance the depositor might otherwise have. This view is in accord with the usages of the business and commercial world and with the general understanding of the legal significance of the certification of a check.

In summing up the case the court said:

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"The controversy arises out of the appropriation of $3,000 under the following circumstances: The decedent carried an active account with the bank and desired to make some loans. He entered into an agreement with the bank, in which it was stipulated that he would draw a check upon his account for $1,500, which check should be certified by the bank, properly indorsed, and then be retained by the bank as collateral for any indebtedness of the maker to the bank. The evidence shows that this arrangement was carried out. At a subsequent date an agreement of the same import, involving the same amount, and including the same terms, was made and carried out.

"The testimony of the cashier, which is not contradicted, conclusively shows that, upon the very day when each check was certified, it was immediately charged upon the books of the bank against the account of decedent, in whose lifetime the books were balanced, showing the charges thus made. At the time of decedent's death his own bank book showed the appropriation by the bank of the respective amounts for which the certified checks were drawn. These transactions were carried out in strict compliance with the terms of the agreements entered into, and we can see no reason in law or equity why an agreement of this character, lawful in its terms and properly made in the course of business dealings, should be disturbed. The bank became liable for the payment of the check as it was certified, and very properly charged the account of the maker with the amount of each check as soon as its liability for payment attached. The fact that the bank took this method of securing the payment of existing obligations or of indebtedness to be incurred does not change the nature of the transaction or the liability of the contracting parties."

It is of course assumed in the case that Ingber actually owed the bank $3,000 or more. Since the checks were given as collateral security for the decedent's indebtedness, they could not be held for an amount in excess of such indebtedness.

See Decision No. 1393.

Banks and Banking: Collections.

Of much importance to the banking and general business world is the law governing the collection of commercial paper by the system of correspondent banks. Without some such system the conduct of the business of the world of to-day would be impossible and the law of negotiable paper, together with its use, would be confined to the petty doing of the country store instead of extending, as it does, to every enterprise in commerce, financing, manufacturing or engineering that spreads beyond the limits of the same country store. Gradually by repeated litigation and consequent adjudication this law is becoming well defined. A glance through the files of the Quarterly for the last few years will show scores of decisions on this aspect of the law.

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The recent case of Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston, Decision No. 1394, makes clear certain principles of law governing this branch. The rule in most banks is that paper deposited for collection cannot be drawn against unless certified until it has actually been collected. This is a reasonable rule and has been upheld by the courts. Suppose, however, the rule is not enforced or that a certain bank has provided no such rule. If under these conditions, a depositor who has forwarded paper for collection be allowed to draw against the amount of such paper before actual collection thereof and the paper be subsequently returned dishonored, what rights has the bank who advanced money on the strength of the dishonored paper? Clearly if the depositor has endorsed the paper, as is usually the case, the bank, under familiar principles of the law of negotiable instruments, may sue him on his endorsement. In any case, however, it may recover the amount so advanced under the reasoning of the case we are discussing. It is there held that the advance by the bank pending the collection was a mere loan from the bank to the depositor and consequently if it were not paid by the proceeds of the paper could be recovered from the depositor whether he had endorsed the paper or not. On this point the court said:

"It will be remembered that, as soon as the Farmers' Bank received notice that the draft had been received by the Merchants' Bank, it at once entered the amount of the draft to the credit of Potts & Lynch, and permitted them to check it out in ordinary course of business. This was nothing less than an advancement or loan to Potts & Lynch on the faith of the payment of the draft, and, the draft remaining unpaid through no fault of the bank, left Potts & Lynch its debtors to the extent of the amount so advanced. Thus far we have not discussed the question of liability of the Farmers' Bank to Potts & Lynch, growing out of the matters pleaded by the latter, for the alleged negligence of the former in informing them that the draft had been paid, and in not informing them of the noncollection of the draft in time to allow them to present their claim to the receiver, and thus collect their proper proportion of the debt owing them by the lumber company."

Of course the intention of the parties at the time the depositor is allowed to draw is not in so many words that a loan is to be made by the bank. Nevertheless the intention of both the bank and the depositor, unless there be fraud on the part of the latter, undoubtedly is that the bank will not lose if the paper be dishonored, irrespective of the fact of endorsement or non-endorsement of the dishonored paper. This intention is, therefore, given practical effect by this decision, and hence the decision is in accord with justice and common sense, although perhaps some technical fault might be found with its logic.

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Of course if the non-payment of the paper be caused by any negligence on the part of the bank the bank has no rights against the depositor. On the contrary, the depositor has a right against the bank for any loss caused him by such negligence. So it was in the case we are discussing. In that case the drawee of the draft which was forwarded for collection became insolvent. The forwarding bank neglected to notify the depositors until too late to prove their claim against the insolvent. It was shown that if the claim had been proved the depositors would have received a dividend of 42 per cent. The court therefore held that the bank, by reason of its negligence, was liable for the amount thus lost and that the depositor could avail himself of this right either by an affirmative action or by way of a defense to the amount of the loss. The court said in part:

"The issue of negligence of plaintiff in not informing these appellants of the non-collection of the draft in time to allow defendants Potts & Lynch to present their claim to the receiver for allowance before the close of the receivership, and their loss in consequence, was raised by their pleadings. The bill of exceptions referred to shows that the testimony offered and rejected was substantially as stated in the assignment. If in fact the Farmers' Bank informed Potts & Lynch, and they were thus led to believe, that their draft had been paid by the lumber company, and if they had been seasonably informed that the draft had not been paid, they would have taken such steps as would have resulted in the collection from the receiver of 42 per cent. of their claim, and they were not so informed, we see no reason why they would not be entitled to a judgment against the bank for this amount in set-off to the claim of the bank for the amount advanced by the bank to them."

See Decision No. 1394.

Bills and Notes: Promissory Note: Negotiability.

A promissory note must contain a promise to pay a definite or ascertainable sum of money absolutely and without conditions at a time that is certain to arrive. In addition to these requirements, if the note is to be deemed negotiable it must contain the words of negotiability, i. e., it must be payable to the order of a certain person or to bearer. Should a note lack this last feature it might be a promissory note, but it would not be negotiable. Hence, although all negotiable notes are promissory notes, all promissory notes are not negotiable. It was necessary for the Supreme Court of Massachusetts to invoke this distinction in deciding the case of Bryne v. Bryne, Decision No. 1395, where the instrument in question read as follows:

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Boston, Mass. September 3, 1903.

7 Water Street.

Borrowed and received from George M. Bryne, five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.

J L. Bryne

Bills and Notes: Negotiability: Promissory Note.

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This note was construed by the court to be a promissory note, since the word "payable" purports a promise to pay. It was held, however, to be non-negotiable since it did not contain the words of negotiability, i. e., was not made out to the order of any person or to bearer.

(See Decision No. 1395.)

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"George M. Bryne
"Contract for Public Works
"Room 802

"Boston, Mass., September 3, 1903.

"7 Water Street.

"Borrowed and received from George M. Bryne, five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.

"(Signed) J. L. Bryne."

The court held that this instrument contained all the elements of a promissory note, since the word "payable" imported a promise to pay, but that it was not negotiable, since it did not contain the words of negotiability. Hence it could be assigned, as can almost any other chose in action at the present time, but it could not be negotiated. Therefore any one who bought the same, no matter how complete his good faith, took it at his peril and subject to any defences which might have prevailed against the original holder.

In other words, one who takes such an instrument acquires no greater right than his assignor and stand in the shoes of the latter. On the instrument in question the court said:

"It is plain, we think, that the instrument declared on is a promissory note. It is not a negotiable promissory note and is not declared on as such. The word 'payable' in the connection in which it occurs imports a promise by the maker to pay at the time fixed the sum named. The promise is not one implied by law from an acknowledgment of indebtedness, but is the maker's own promise. It is not contended that the other elements necessary to constitute a promissory note are not included in the instrument declared on."

See Decision No. 1395.

Bills and Notes: Negotiability.

In the preceding note we stated that one of the essentials of negotiability was that the promise to pay must be entirely unconditional. This requirement is illustrated in the case of the Equitable Trust Co. of N. Y. v. Newman, Decision No. 1396, where the instrument in litigation consisted of a letter in the following form:

"New York, December 19, 1903.

"Mr. Archibald C. Haynes, General Agent, The Equitable Life Assurance Society, No. 25 Broad Street, N. Y. — Dear Sir: I hereby acknowledge having received from Mr. Geo. Schlesinger policy No. 1,288,163, being for $20,000, on my life, in the Equitable Assurance Society. You are authorized to place the said policy in force from this date, and I promise to pay you or your order the first annual premium, amounting to $634.60, as follows:

Cash paid to George Schlesinger	$234.60
April 15th, 1904	200.00
Sept. 15th, 1904	200.00
	$634.60

"Very truly yours, Charles A. Newman."

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The court below held that this letter had all the essential features of a negotiable instrument and was therefore negotiable. This decision of the lower court we discussed at page 139a of the Quarterly for July, 1911. The decision itself will be found in that issue as Decision No. 1381. Decision 1396 is the same case on appeal, and in the opinion the higher court disagrees with and therefore overrules Decision No. 1381.

In the latter opinion the court argues that in the first place the instrument is not in the usual form of negotiable instruments, but is merely a bit of business correspondence, and therefore presumably it was not the intent of the writer to issue a negotiable instrument. The main reason, however, the court reasons is more fundamental. The whole letter contains a conditional, not an unconditional, promise to pay. The promise to pay, though not expressly made conditional in the writing, is necessarily conditional by implication. It is a promise on the part of the writer to pay the sum mentioned on condition that the agent on his part perform his share of the undertaking, i. e., procure the policy and carry out the other conditions. This construction of the instrument constrains the court to hold it non-negotiable, and it does so, saying:

"The mere fact that an instrument in negotiable form, promising absolutely to pay a sum of money, contains a statement of a future consideration, does not render the promise conditional upon the due performance and receipt of the future consideration. In this case, however, the instrument signed by the defendant is in the form of a letter, and not of a note. It recites the receipt of a policy of insurance, and gives the agent authority to make the policy effective, and by fair construction it is not intended to be a present unconditional engagement, but is conditional upon the agent performing his part of the contract. While no special form is necessary to render an instrument negotiable, in this case the fact that the instrument is not in the usual form of mercantile paper, and does not appear to have been intended to pass as such, must be considered upon the question of whether the defendant intended to make an unconditional promise, and is one strong point of difference from the case relied on by the respondent. It seems to me that, when the defendant signed this contract, he simply agreed to reimburse the general agent for advance payment of premium, and that any person reading the instrument could well understand that its sole intent was to embody in writing the defendant's future obligation under the contract with the agent, and that this obligation, as in other executory contracts, was dependent upon due performance by the other party."

The higher court does not pass upon the questions of law relating to insurance law which were decided by the lower court in Decision 1381, as the finding that the instrument was non-negotiable rendered this unnecessary.

See Decision No. 1396.

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Bills and Notes: Negotiability: Indorsement: Evidence: Handwriting.

In the two notes immediately preceding this we have been glancing at the essentials of negotiability. An element mentioned in the former of the two, but not there elaborated upon, forms one of the grounds of decision in Stitzel v. Miller, Decision No. 1397. In that case the note contained the usual words of a promissory note but also contained several additional provisions. Among the latter was the following:

"We also agree that in case said note is not paid at maturity, that it is at the option of the holder thereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof."

It was claimed that this provision rendered the time of payment uncertain and depended on the will of the payee, and since certainty of the time of payment is one of the essentials of negotiability, that, therefore, the note was not negotiable. There would seem to be some plausibility in this contention did one fail to consider that in all cases the payee or holder of a negotiable instrument has the same power by implication. In every case, whether the instrument itself so provides or not, the payee or owner of the same has the right to extend the time of payment. This implied right, of course, is subject to the limitation that under certain conditions the exercise of it will release guarantors and indorsers. It has never been contended that this implied right impaired negotiability, and it is difficult to see why or how the expression of what the law itself would imply can render the instrument non-negotiable.

In the case we are discussing, moreover, the note itself provided that it was payable "one year after date," i. e., on Feb. 22, 1909. On this fact the court based its argument. The time of payment was fixed and certain of arrival, i. e., Feb. 22, 1909. The fact that this time might thereafter be extended did not alter the other fact — that Feb. 22, 1909, was the time fixed for payment. Therefore, held the court, the time of payment was fixed and the provision in dispute did not impair the negotiability of the note. We quote the court:

"It is urged that the quoted words render the instrument non-negotiable. This court has held that a promissory note 'may be defined to be a written promise by one person to pay to another person therein named, or order, a fixed sum of money at all events and at a time specified therein or at a time which must certainly arrive.' McClenathan v. Davis, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017. This definition substantially meets the requirements of the negotiable instrument act of 1907. The contention that said quoted words gave the holder the authority to extend the note as he pleased, that it could

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not be known what extensions he might grant, and that, therefore, the time when the note became due and payable was uncertain and indeterminate, rendering the note non-negotiable, cannot be sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity. The time of payment is certain. The note is dated February 22, 1908, and payable one year thereafter. After a note is due its negotiability, for all practical purposes, is at an end. In Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99, it was held that a provision in a note that, if it was not paid when due and suit was brought thereon, the maker should pay an attorney's fee of 10 per cent., recoverable either in such suit or a separate action, did not destroy the negotiability of the note, as it did not take effect until after maturity. Numerous authorities are cited from this and other States by counsel for appellant on this question. In most of them the note recites that the payee reserves the right of option of extension at any time, either before or after maturity, and we do not consider them in point. The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment or the person to whom the payment is to be made. The clause in question does not destroy the negotiability of the note."

It is well settled that when an instrument is negotiable the writing of the name of the payee on the back thereof and the delivery of the same to a third party, *prima facie*, transfers to the third party all rights in the instrument, together with the right to sue thereon in his own name. This rule is reiterated in Stitzel v. Miller in the following words:

"The note being negotiable, the indorsement of the name of the payee on its back and its sale and delivery to appellees authorized them to maintain this action in their own names."

As a rule questions of procedure and evidence are not within the scope of this publication, yet nevertheless one question of evidence is decided in the case we are discussing which is of so much practical importance that it will do no harm to state it briefly. If one desires to testify that a piece of writing is in the handwriting of a certain person, he must, unless he can qualify as an expert, be able to show one of two things — either that he has seen that certain person write (once is all that is legally necessary, though, of course, the oftener he has seen the greater weight will his testimony have) or that he has had correspondence with that person, writing letters to him and receiving answers in return. Here again the weight of the testimony will depend on the number of times there has been an exchange of letters, the length of time over which the exchange extended, and the recentness of the exchange. The rule of law is thus stated by the court in Decision No. 1397:

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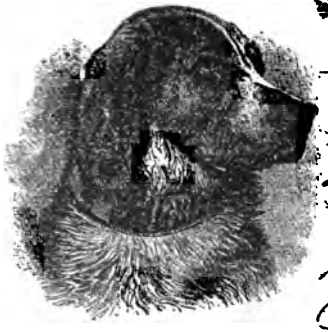

$700 Eleven Hundred 00/100 Dollars

Eleven Hundred 00/100 Dollars

Eleven Hundred 00/100 Dollars

This note was made out to one J. H. Stafford. In transferring the same Stafford wrote his name on the face thereof as it appears in this copy, instead ot on the back. Such writing of his name by Stafford was held to constitute a sufficient indorsement

(See Decision No. 1398.)

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"A witness who has seen another write is competent to testify, as is also one who has acquired a knowledge of the other's handwriting by correspondence or in the ordinary course of business."

See Decision No. 1397.

Bills and Notes: Indorsement: Presumption that Holder is One in Due Course.

In discussing the case immediately preceding we saw that an indorsement is generally the writing on the back of an instrument the name of the payee or other party to a negotiable instrument. The very meaning of the word "indorsement" signifies "on the back." Nevertheless to constitute legal indorsement it is not absolutely necessary that the writing should be on the back of the instrument. If there be no room on the back it may be written on a separate piece of paper and attached to the original instrument. This is by the express provision of the Negotiable Instruments Act, which merely enacted into statutory form what had long been the usage and custom of merchants. In First National Bank of Etowah, Tenn., v. Messer, Decision No. 1398, the payee had signed the note on its *face*, and immediately under the name of the maker, instead of on the back in the usual way. A copy of this note appears in this issue. The court held this to be a sufficient indorsement, and said:

"The ordinary and usual mode of indorsing a negotiable instrument is to write the name of the indorser upon the back of the paper. But where the payee writes his name on the face of the note under the maker's signature, the effect is to transfer the title of the note to the transferee, and the payee becomes liable as an indorser."

We have frequently had occasion to state the rule of law that presumptively the holder of a negotiable instrument was a holder in due course and that, therefore, it is unnecessary for him to prove, as part of his affirmative case, that he is actually such holder. This rule is reaffirmed in the present case in these words:

"The holder of a note is presumed to be such bona fide and for value; if either fact negatived by proof, the defendants are let in to all their defenses; such presumption is negatived by proof of any fraud in the procurement of the note."

See Decision No. 1398.

Bills and Notes: Time and Place of Payment.

In most instances we presume a promissory note is made payable at some bank. Certainly this is so in enough cases to make worth while a few words as to the legal effect of such a provision. In the

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first place it is obvious that where there is such a provision it necessitates, unless there be a waiver, the presentation of the note at the designated bank during office hours of the day on which payment is due. While it is not necessary for the holder to show such presentation and demand, nevertheless the maker may show that he was at the designated place on the due day and that no such presentation or demand was made. This question arises, however — suppose the maker merely deposits with the bank named sufficient funds to meet the note; is this sufficient on his part? To this question Kerbaugh v. Nugent, Decision No. 1399, answers no, unless the holder has deposited the note for collection in the same bank and thus constituted it his agent for collection. The court reasons in this wise:

"A note made payable at a particular time and place does not impose upon the payee or his assignee the necessity of averring or proving a demand at the time and place fixed in the note; but the payor may show a readiness to pay such demand at such time and place. Section 374, Burns, 1908; Glatt v. Fortman, 120 Ind. 384, 22 N. E. 300; Eaton, etc., R. Co. v. Hunt, 20 Ind. 457; Brown v. McElroy, 52 Ind. 404, 406; Dillingham v. Parks, 30 Ind. App. 61, 69, 70, 65 N. E. 300. It follows from the above that the maker of a promissory note, payable at a particular bank, cannot discharge such obligation by depositing in such bank the funds with which to pay said obligation, and that money so deposited in such bank cannot be deemed to be deposited with the payee's agent, except, of course, that, in the case the holder of such note deposits the same at such bank for collection, he thereby constitutes such bank his agent for such purposes."

With all deference it is submitted that this decision is incorrect. It will be admitted, we assume, that it is not necessary for the maker himself to be present in person at the bank and pay the money. Obviously he may make this payment through an agent. Now the effect of depositing in the bank designated as the place of payment sufficient to meet the note practically amounts to appointing the bank the agent of the owner for the purpose of such payment. It is difficult to see why the appointment of any one other than such bank as such agent should have an entirely different effect from the appointment of such bank. Furthermore, the court concedes that if the holder of the note designates the bank as his agent for the collection of the same then the mere deposit in such bank by the maker of sufficient to pay the note will be sufficient. How this can be so when the court says that such deposit is not sufficient when the holder himself presents the note for payment we cannot understand. It is impossible to see why the mere appointment of a certain bank as agent to do a certain act can have an entirely different effect on the legal construction placed upon the act of another person than if any other were appointed as agent or the act were performed by the principal himself. We respectfully

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submit that the court erred in its findings and that the rule should be that where a note is payable at a designated bank, the deposit of funds sufficient to pay the same and for the purpose of such payment is sufficient. Not only does this rule seem to us the more logical, but we believe that it more nearly conforms to the understanding of the business world and inclines towards the easy and expeditious dispatch of business.

See Decision No. 1399.

Bills and Notes: Accommodation Paper: Parol Evidence.

One of the best settled rules of evidence is to the effect that evidence of any contemporaneous or prior oral agreement will not be received in order to vary the terms of a valid written contract. The reason for this rule is to be sought in convenience rather than in logic. It does not require much consideration to appreciate the interminable confusion that would exist were parties, after duly signing a formal contract, allowed to prove that though the contract clearly stated one thing, it had been orally agreed that it should mean another. There would be no sense in having written contracts under such a system of jurisprudence, uncertainty and confusion would reign supreme and fraud and perjury would be at a premium. There are, of course, exceptions to this rule, as there generally are to all rules, especially those founded on convenience. One of these exceptions is to be found in the law of negotiable instruments, where it is laid down that the true relations of the parties to a negotiable instrument *inter se* may be shown by oral testimony, as may the fact that one who is liable on the face of the paper only secondarily is actually liable primarily. So it is held in Lamberson v. Love, Decision No. 1400, where the court says:

"The weight of authority is that the relations and liabilities of the parties to accommodation paper may be shown by parol evidence, and it may be shown that a person who is apparently liable only secondarily on the instrument is in fact the principal debtor."

This case also reaffirms the rule, long established by statute as well as decisions, that where the party who is accommodated in accommodation paper pays the amount called for therein the instrument is discharged and the accommodated party, by reason of such payment, acquires no rights against prior parties, no matter what relation they appear to have on the face of the paper. Said the court:

"It is settled law that the payment of accommodation paper by the party accommodated discharges the instrument. This is also now the express provision of our negotiable instruments law."

See Decision No. 1400.

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Bills and Notes: Checks: Reasonable Time for Presentment: Identification of Payee: Negotiable Instruments Act.

In Zaloom v. Ganim, Decision No. 1401, the facts as stated by the court were as follows:

"The defendant gave his check, dated August 4, 1910, drawn on the European-American Bank in this city, and delivered it between 4 and 5 o'clock in the afternoon of the day of its date to the plaintiff in payment of a debt. Plaintiff on the following day, August 5, 1910, deposited the check to his account in his own bank of deposit, the National Reserve Bank, which is also located in this city. On August 6, 1910, the National Reserve Bank, in the regular course of business, presented the check to the European-American Bank for payment, where payment was refused, because of the fact that the State Banking Department had taken possession of the bank, August 5, 1910, it would have been paid."

The court by a vote of two to one held that the delay in presentment of the check did not discharge the drawer. In other words, one receiving a check during business hours of any day must deposit it in his own bank for collection on that day, or, if received after business hours, must so deposit it during business hours of the next succeeding business day. Since the writer had always understood the law in New York to be that a check received during business hours must not only be deposited but actually *presented* at the drawee bank for payment on the same day or within twenty-four hours thereafter, it was with considerable surprise that this decision was noticed. In reaching its decision the majority of the court says:

"The Negotiable Instruments Law does not define the period which may elapse between the giving and presentation of a check, but makes it incumbent on the payee to present it within a reasonable time. Section 322. 'Reasonable' is a relative term, to be determined according to the circumstances of the case. 33 Cyc. 1560. 'Reasonable time' means:

"'So much time as is necessary under the circumstances conveniently to do what the contract requires should be done.' Hinds v. Kellogg, (Com. Pl.) 13 N. Y. Supp. 922.

"Lord Ellenborough, in a leading case (Rickford v. Ridge, 2 Campb. 537), discussing the rules of law applicable to checks, their presentment, notice, and protest as between drawer and payee, says:

"'The rule to be adopted must be a rule of convenience.'

"Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. 2 Bouvier's Law Dictionary, 1182. By the phrase 'usage of trade' the law means usage fixed in the commercial law. It must be known, uniform, certain, reasonable, and not contrary to law or opposed to public policy.

"'The true test of a commercial usage is it having existed a sufficient length of time to become generally known, and to warrant a presumption that contracts are made in reference to it.' Smith v. Wright, 1 Caines 43, 2 Am. Dec. 162.

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"Before the establishment of the Clearing House Association on October 11, 1853, there were fifty-two banks in this city, each sending messengers back and forth to present checks for payment, and, as there was no national currency, balances had to be paid in gold coin. The labor of counting and carrying this was so onerous that actual transfers of cash were made but once a week, although accounts were balanced on the pass books and bills were exchanged daily. The bags of coin were so heavy and precious that they were often transported in wagons guarded by militia. Since the formation of the Clearing House Association the obligations of almost the total number of banks in this city are balanced daily, with the least possible transfer of actual cash from debitor to creditor banks. The messengers of the various banks met daily at a stated time at the Clearing House, to adjust balances of accounts and receive and pay differences, thus obviating the confusion, labor, expense, and danger of loss which would be incident to the presentment of hundreds of thousands of checks daily to the various banks in this city. Encyclopedia Americana.

"The annual report for the year 1910 of the manager of the New York Clearing House Association shows that in 1854 the average daily clearings through the New York Clearing House were $19,104,504.94, and the clearings for that year were $5,750,455,987.06. In 1906 the average clearings were $342,422,772.57, and the total for that year was $103,754,100,091.25. In 1910 the daily average clearings were $338,461,911.11, and the total for that year was $102,553,959,069.28. The average number of checks that pass daily through the New York Clearing House is 250,000. The Clearing House Association is now composed of thirty-one national banks and eighteen State banks. There are thirty-one banks and trust companies in the city of New York and vicinity, not members of the association, which make their exchanges through banks which are members of the association — a total of almost every bank and trust company in this city.

"This usage of trade and business in presenting checks for payment has become incorporated into the banking business of the State and country, and would be seriously affected if immediate presentment to the paying bank were required. Bearing in mind the general commercial law that the paying bank is required to satisfactorily identify the payee (Myers v. Brown, (App. Div. Feb. 1911) 127 N. Y. Supp. 374, reported in the New York Law Journal February 8, 1911), and bearing in mind, also, the vast number of checks daily used in the city of New York, it is apparent that, if the banks and trust companies of New York City were required, immediately upon their receipt, to present deposit checks to the banks upon which they are drawn for payment, confusion amounting almost to chaos would be the result.

"In Hooker v. Franklin, 2 Bosw. 500 (affirmed, Court of Appeals, October, 1861), Bosworth, J., says

"'A rule which required all banks in the city of New York to present for payment all the checks deposited by their customers on the day of their deposit would compel them to decline business of that character, and defeat the objects, in many cases, for which deposits are made, and put an end to certain facilities, which result from ob-

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taining credit for the amount of a check, for the day of its deposit, without providing for its payment until the following morning.'

"It further said:

"'Certainly no laches can be imputed to a depository, receiving it for presentation and collection, who, in presenting it on the next day after its receipt, acts in conformity with the regular and established course of business in such cases.'

"I have not overlooked the cases which hold that a check on a bank in the city in which the payee resides must be presented for payment not later than the day following its receipt. These cases may be distinguished from the case under review. The facts and circumstances in each case must in a great degree govern the rule to be applied, and the facts in those cases differ materially from those of the present case."

In a dissenting opinion filed by Mr. Justice Delany, that doctrine on this point which we have always understood maintained in New York is vigorously and ably upheld in the following language:

"The rule thus established regarding the time within which a check drawn on a bank in the same city as that of the payee must be presented may be a rigorous one but, whether so or not, it has a time-honored acceptance, and may be assumed as a condition recognized as controlling in business relations. The payee must present the check to the bank for payment, it is true, within a reasonable time; but the stringent requirement emphasized in every case is promptness in presentation, and what time, as a matter of law, must elapse before such presentation, in order to justify a finding of want of promptness, must depend upon how we can harmonize the various expressions of the courts on the question. Some courts have held that a check is to be considered like an inland bill of exchange, and should be governed by the same rules. Smith v. Janes, 20 Wend. 192, 32 Am. Dec. 527. Others that a check is to be presented within twenty-four hours after its receipt. Kramer v. Grant, 60 Misc. Rep. 111, 111 N. Y. Supp. 709. Other, again, that it is to be presented on the same day or the following day. Smith v. Janes, supra; Dehoust v. Lewis, 128 App. Div. 132, 112 N. Y. Supp. 559; Carroll v. Sweet, 128 N. Y. 22, 27 N. E. 763, 13 L. R. A. 43. Other still, within the business hours of the following day. Murphy v. Levy, 23 Misc. Rep. 149, 50 N. Y. Supp. 682. Nor is one required to make this presentation for payment excused for failure to do so by the fact that he has transferred it to another for collection. Kramer v. Grant, supra; Smith v. Miller, 43 N. Y. 171, 177.

"The plaintiff in the case at bar, therefore, cannot claim as an excuse that for his own convenience he deposited the check in another bank for collection. This act would, in the usual course of business, necessarily postpone its collection for another day. If prompt collection required its presentation the day following its receipt, he adopted this course at his peril. If a rule is to be deduced from all the cases cited, I think that it may be stated thus:

"'The promptness enjoined requires that, in the absence of any extraordinary circumstances, the holder of a check on a bank in the

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same city should present it for payment not later than the closing hours of the bank's business day following its receipt.'

"This case is extremely close, but I nevertheless believe that it comes within the rule that, where one is willing to accept payment in that form, he must, to save himself harmless, act with the required promptness. A consideration which might be a makeweight in determining whether this strict rule should be applied here is that: The plaintiff intrusted the collection of the check to slower agencies than direct presentation, and he thus relied upon the stability of one bank, or the quickness of action of the other. This reliance should work to his own detriment, rather than to that of the maker of the check, and it may well be that some such reason lies at the base of the decisions."

Since the court which delivered the opinion is not the highest in point of jurisdiction in the State of New York, it will be interesting to note what the higher courts will do with this decision if it should reach them on appeal.

It may be said here that in our own opinion common sense and the convenience of the business would demand that the law be as indicated in the opinion of the majority of the court, but that the contrary doctrine has become so firmly rooted in the jurisprudence of the State of New York by judicial authority that it will require legislation to accomplish the change.

The court in this same case, presumably without dissent, holds that where the facts in a case are not disputed the question of what constitutes reasonable time is one of law for the court. Substantially of course this is correct, but we respectfully suggest that a nicer and more critical use of language would hold that the question is one of *fact* for the court.

In this case the law is once again reaffirmed, though only by way of *dictum*, that the duty of identifying the payee or the one presenting the instrument for payment rests on the bank making the payment. From this it follows that if this paying bank makes any mistake in such identity and thereby pays to the wrong party, it is liable to its depositor for the amount so paid.

See Decision No. 1401.

Carriers: Freight: Rates: Discrimination.

For many years, although originally the common law held to the contrary, all courts have agreed that a common carrier must serve all without discrimination. True, these same courts have split wide apart on the question as to exactly what constituted discrimination. This difference of opinion on the part of the courts, together with the well-settled practice of the great roads to rack the ingenuity of the

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human mind in inventing new practices by which inconvenient decisions might be gotten around, placed the law as to discrimination, at least in its practical workings out, in a most confused and chaotic condition, although all the time everybody was very clear that all discrimination on the part of a carrier was forbidden. Gradually, however, the courts have approached more nearly together, the subterfuges of the roads have been declared illegal one by one as they came before the courts and the various legislatures have co-operated by the enactment of stringent statutes — most notable of all are the several amendments to the Interstate Commerce Act — until at the present time, while we have not unanimity of opinion, we have at any rate a decided advance over the state the law on this subject was in fifteen or twenty years ago.

It must be understood what is meant by discrimination. In the first place it is not discrimination for a railroad to refuse to carry freight of a kind totally different from any it has ever carried or held itself out as being willing to carry. Such refusal is within its rights. Discrimination consists in the refusal to grant the same service to each and every member of the public under the same conditions and for the same rates.

This question of discrimination was raised in the case of Crescent Coal Co. v. Louisville & N. R. Co., Decision 1402, where the court, in line with what we have been saying, said:

"A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and, if it was only engaged in the carriage of specified articles it would not be under any obligation to carry other things. If it carried for every person, who offered it, the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. Hutchinson on Carriers, vol. 1. secs. 59, 90, 144. But, as the appellee company was engaged in the business of carrying coal, as well as all other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obliged to carry for all persons all classes and character of freight offered to it. Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. Law Rep. 1122. The argument is further made that it had persistently and uniformly declined to haul coal from this mine to places in Henderson, and this was well known to Higdon when he made the contracts referred to; but this custom did not confer upon it the right to continue the discrimination. That it had never engaged in the business of carrying coal in the manner desired by Higdon did not under the circumstances of this case authorize it to refuse to render the service when demanded. No length of time, or manner of treatment, or habit of dealing, will discharge a common carrier from the obligation to furnish to the public the service it is engaged in performing. The appellee company could not transfer between mills and factories corn, wheat and other articles, and refuse to transfer under the same conditions coal."

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The decision also reaffirms the right of a carrier, in the absence of any statute fixing rates, to establish rates for the hauling of freight. These rates must be reasonable and must be the same to all. What constitutes a reasonable rate is one of extreme difficulty. We shall not attempt to deal with it here, but may take it up in some future issue. Let it suffice here to say that the question of reasonableness of rates presents two aspects. The first is where the whole schedule of rates is being considered, as where a statute attempts to impose the rates to be charged by a road. In such case the rates must be such that with them the road may earn a reasonable return on the investment. The second phase of the question presents itself where the reasonableness of any particular rate for the carrying of any particular freight for an individual shipper is questioned. Under such conditions the rate must be reasonable to the shipper, i. e., a reasonable payment considered in relation to the advantage he gets by the shipment, whether it will in this business yield a profit to the road or not. The courts in these cases give the railroads the alternative of serving the public for a reasonable charge or going out of business.

See Decision No. 1402.

Carriers: Liability for Injury to Goods: Burden of Proof.

We have on several occasions in the past spoken of the carrier's liability for goods intrusted to its care. We have seen that this liability is practically absolute — that with a few well-defined and strictly limited exceptions the carrier is an insurer of the goods that are being carried by it. If, then, the goods are injured or destroyed while in the control of the carrier, unless by one of the causes covered by the few exceptions, the carrier must make good the amount of the loss, even though it happened without any negligence whatever on the part of the carrier or its agents or servants. Must the one claiming that the carrier it liable for a loss suffered in transit prove the cause of the loss and that it was not one of the causes covered by the exceptions to a carrier's liability? This question has often been before the courts and the decisions have been uniform. To force the claimant to prove that the loss was caused by a cause not covered by the exceptions to a carrier's liability would be forcing him to prove a negative. This the law generally does not impose upon any suitor, and hence, when any loss occurs during shipment, all that the claimant need prove is the delivery of the goods to the carrier, their destruction or injury while in the possession of the carrier, and their value before and after the loss. It then remains for the carrier, if it seeks freedom from liability, to show that the loss was caused by one

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of the excepted perils. In the words of the courts there is a presumption of the carrier's liability whenever goods in its possession are found injured, or, in different phraseology, where there is such a loss the burden is on the carrier, if it desires exoneration, to show that it was caused by one of the excepted perils. So it was held in Moore v. Chicago, R. I. & P. Ry. Co., Decision No. 1403, where the court says:

"Assuming, therefore, that the jury would be justified in believing this testimony, the burden was upon the defendant as a common carrier to show by a preponderance of the evidence that its failure to deliver the sheep safely at Elkton was due to some inevitable accident, or disease, weakness, or other defect inhering or existing in them, and not chargeable to any want of due care on its part."

See Decision No. 1403.

Carriers: Private and Common Carriers: Contracts for Exemption for Negligence on the Part of a Carrier.

In the two preceding cases we have been discussing certain of the rights and liabilities pertaining to common carriers. By common carriers is meant those who hold themselves out to carry for all seeking their services. "Public carriers" is perhaps a phrase more accurately descriptive of their functions and characteristics than is "common carriers." There may be, however, a private carrier as well as a common carrier. A lumber company runs a logging road for its own convenience. Occasionally, however, by a special arrangement, it will carry certain persons living near this road. Such incidental carrying does not amount to an invitation to the general public, and is private and not common or public carrying. Now it is to public or common carrying alone that the law attaches any peculiar duties, rights or obligations. A private carrier is governed by the general rules of law applying to private individuals and by no other or different ones.

This is illustrated by what is said by the court in the recent case of Sullivan-Sanford Lumber Co. v. Watson, Decision No. 1404. In that case a logging road, under conditions similar to those just described above, was carrying one Watson on a pass releasing the company from all liability for injury to Watson, whether caused by its negligence or otherwise. Now Texas, in which this case was decided, is one of the States holding to the doctrine that such a contract made by a common carrier, whether in relation to the carrying of persons or of goods, is invalid as against public policy. In the case under discussion, the court reaffirms this doctrine, but argues that, as regards goods, not lives, it applies to public or common carriers only,

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and not to private carriers. Human life, however, holds the court, is of such great sanctity and importance that no one, whether public or private carrier, corporation or individual, can contract himself free from liability for negligence which endangers or destroys it. We quote from the decision:

"The facts of that case show that Carter & Bros. were the owners of a sawmill and planing plant situated on a lot adjoining a spur track of the railway company. Their plant, together with a stock of lumber, were burned under circumstances from which it might have been inferred that the fire was due to sparks escaping from a locomotive belonging to the railway company. Carter sued for damages, alleging negligence on the part of the railway company in failing to properly equip its locomotive with a sufficient spark arrester, and on the part of the servants of the railway company in its operation upon that occasion. Among other defenses, the railway company relied upon a contract by which they were released from any liability for damages resulting from such conduct. The contract recited an agreement by which the railway company was to build the spur track a distance of about 70 feet from the main line at the point where Carter's plant was situated, and that it was done for the latter's convenience in shipping lumber and other freight. It is then provided that, in consideration of the premises and of the construction of that side track and switch, the owner of the mill released the railway company from all damages and claims arising from the injuring or killing of stock belonging to him, or his contractors, or employees, or that might be injured or killed by locomotives or trains or cars of the railway company on the line of the road or on its tracks, and for all damages resulting from the injury or destruction of any property whatever that might be injured or destroyed by fire or sparks from any locomotive of the railway company at or about that switch. In reply Carter sought to evade the force of that contract by attacking its validity on the ground that it was opposed to public policy, in that it was contract exempting a common carrier from the consequences of its negligence. While the case was pending in the Court of Civil Appeals, that question and others were certified to the Supreme Court. Justice Brown, in an opinion sustaining the validity of the contract, says: 'A railroad company, when not contracting in its character of common carrier, has the same right of contract as other corporations or persons, and in many instances may make contracts for immunity from liability on account of the negligence of itself and servants.' After referring to a number of authorities, among which are included what are commonly called the 'Express Company Cases,' decided by the Supreme Court of the United States, he continues: 'We can see no reason why the contract in this case should be forbidden that does not apply with equal force to the cases cited. There being no general rule of public policy which will condemn this contract, the inquiry then arises: Is there in the State of Texas any such policy indicated, either by statutory provision, its Constitution, or judicial decisions, as would establish a right to the public inconsistent with the terms of this contract?' After discussing the principles underlying the proposition, he then says: 'We conclude that the contract

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certified is not violative of the public policy of the State, but is a legitimate exercise of the liberty of contract, by which the appellees voluntarily, and for the purpose of securing the convenience of the railroad at that point, agreed to release the railroad company from liability for injury which might occur to their property by the negligence of the employees of the railroad, or by such unavoidable accident as is frequent by the escape of fire from the best equipped machinery.'

"The effect of that decision is to say that one not a common carrier, and even a common carrier itself when not contracting as such, may by contract secure immunity from liability for damages resulting from its negligence or that of its servants. The distinction between that case and the one before us lies in the difference between property and human life. When considered as an object of governmental protection, these are not to be put in the same class. The protection vouchsafed to one in the enjoyment of his property is that he shall not be deprived of it without his consent, except in some manner pointed out in law. It is given for the personal benefit of the property owner. All conduct resulting in injury to one's property or property rights is deemed wrongful only when in opposition to the consent of the owner. The owner alone, in the eyes of the law, has the right to complain of such injury. But not so with respect to the lives of individuals. In the preservation of these the public at large has an interest. Conduct which results in the destruction of life is not relieved of its culpability by the consent of the victim previously obtained, or by his condonation thereafter given. If the guaranty of public security sought to be made effective by prohibitory legislation is one of the essential and primary duties of government, the observation of the regulations and restrictions imposed for that purpose become the duty of every citizen within the State. If it is made a personal offense to negligently kill another, then it follows that the duty to observe ordinary care not to kill is one imposed by law for the benefit of society. If this be true, can it then be said that this duty may be contracted away? Every tragic death is a shock to society as well as an injury to the individual. A contract, which provides that for a valuable consideration one may relax that degree of prudence and vigilance toward another which the law enjoins as a guaranty of personal security, necessarily contemplates the doing of something which the law for a wise purpose has forbidden. It is true that the penalty denounced by law for negligent homicide can be visited only upon the person guilty of the wrongful conduct; but civil courts broaden the range of responsibility and extend it to those whom the wrongdoer represents. In this case the principal is a corporation which can act only through its agents; but we do not think it could for that reason make this particular kind of a contract. We know of no reason why a contract, held to be void because opposed to public policy when made by a private citizen, should not be equally as offensive when entered into for the benefit of a private corporation."

We must note at this place that the Supreme Court of the United States disagrees with this view and holds that where even a common

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carrier is acting in a capacity other than that of common carrier it may contract for itself freedom from liability, even for negligence which causes death. (See B. & O. S. W. Ry. Co. v. Voigt, 20 Sup. Ct. Rep. 385.) In this last case an express clerk employed in the baggage car of a train was injured by the negligence of the railroad. When he had entered upon his employment he had signed a contract releasing the express company and the railway company from all liability for injury, whether caused by negligence or otherwise. The court held that the railroad, in carrying the clerk, was not engaged in its capacity as a common carrier, i. e., was not carrying him *as a passenger*, and that, therefore, the rule maintaining in the federal courts to the effect that a common carrier cannot contract for itself exemption from liability for negligence did not apply.

See Decision No. 1404.

Chattel Mortgages: Rights and Duties of Mortgagee: Application of Mortgaged Property.

The Supreme Court of Maine, in Livermore Falls Trust and Banking Co. v. Richmond Mfg. Co., Decision No. 1405, lays down certain important rules in reference to the rights and duties of a chattel mortgage holder.

In that case the banking company held certain notes of the manufacturing company which were secured by chattel mortgages on the plant, stock in trade and business of the latter company. When the notes were not paid at maturity the bank foreclosed its mortgages and took possession of the property mortgaged. This not producing sufficient to meet the indebtedness of the mortgagor, the bank proceeded to enforce a meeting of the deficit by the sureties on the notes of the mortgagee. These sureties endeavored to defeat recovery, or, at any rate, to reduce the amount thereof, by claiming that the bank, when it took possession of the mortgaged property, was under a duty to complete all unfinished products found thereon, in order to make therefrom a profit which could be applied on the debt, and that since the bank in the present case had failed to do this, it should be debited and the sureties credited with the amount of the profit which would thus be realized. The court overruled this contention, holding that a mortgagee, in the absence of bad faith, is under no duty to carry on the business of the mortgagor, even after it has taken over on foreclosure all of the physical properties of such business. The court said:

"At the time the bank took possession of the mortgaged property, the company had on hand a large amount of unmanufactured stock

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and also had contracts for the manufacture and shipment of wool novelties, etc. The sureties claim that these contracts, or some of them, were profitable for the company, and were such as the bank should have completed, but did not, and hence the bank should be debited with the profit it would have thus made. They also claim that by taking possession of the property, shutting down the mills, etc., the bank caused great depreciation in the value of the property, and that it should be debited with this depreciation.

"Without considering other answers to these claims, it is a sufficient answer that the bank, even as mortgagee in possession, was under no legal obligation to carry on the business of the mortgagor. Granting that by taking possession of the mortgaged property the bank stopped a going concern, prevented the company and the sureties from fulfilling profitable contracts, and generally reduced the market value of the plant, it nevertheless was within its rights as mortgagee. It had given it the right to take the mortgaged property into its own possession upon the failure of the company and the sureties to comply with the conditions of the mortgages, but it did not have imposed upon it the duty of assuming the burden and risk of carrying on the business for their benefit. If it became trustee, it was for conservation, not for operation. The company and the sureties could have prevented such taking possession and all the consequences complained of by paying the indebtedness secured by the mortgages. To their failure to do so must be attributed the loss sustained.

"There is no evidence that the mills, machinery, etc., could have been leased, and hence we do not find that the bank should be debited anything for rents and profits."

This case also decides that where a debtor owes to his mortgage creditor several debts and the property mortgaged is not sufficient to pay them all, the mortgagee may on foreclosure designate the debt or debts on which the property is to be applied. On this point the court said:

"The rule that a debtor, in making payments, may designate to what debts they shall be credited only applies to voluntary payments. Further in this case the company, the principal debtor and mortgagor, gave no direction as to how the value of the mortgaged property, or its proceeds, should be applied, even supposing it could do so. The bank, therefore, as between itself and the company, could elect to apply the surplus, if any, to the mortgage indebtedness of a later date than that for which the sureties were liable. It did so elect by bringing suits on the notes signed by the sureties, and none on any other indebtedness secured by the mortgages. Starrett v. Barber, 20 Me. 457; Berry v. Pullen, 60 Me. 101, 31 Am. Rep. 248; Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335.

"The sureties certainly had no greater rights than their principal as to the application of the mortgaged property and proceeds. A surety has the same right as the principal to pay before foreclosure completed all the indebtedness secured by the mortgages, and thereupon he has the right to have delivered to him, instead of the principal, the mortgaged property and its proceeds to the extent of the

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amount thus paid. But 'such previous payment by the surety is alike essential where there is only one debt and one surety, and where there are many debts, all of which are equally protected and secured by the property mortgaged, and many several sureties for the several debts; for the chief and primary object of a pledge or mortgage to a creditor is his benefit, protection, and advantage in reference to each and all of the several debts which it was made or given to secure. And, until this object is fully accomplished, no surety can justly or lawfully interfere to disturb him in the possession of the property pledged, or hinder him from appropriating the proceeds of it toward the payment of any such debt which he cannot otherwise collect or render available. And if there be one or more debts thus secured for which the debtor is alone responsible, and the amount of which cannot be obtained from him on account of his insolvency or pecuniary inability, such proceeds may be applied, so far as necessary for that purpose, to the payment and discharge of such debts, and to that extent the sureties upon notes constituting other debts can have no interest or right in the mortgaged property.' Wilcox v. Fairhaven Bank, 7 Allen (Mass.) 270, at page 272. In considering the claim of a surety to have the proceeds of mortgaged property applied pro rata to the debt for which he was surety, the Supreme Court of Connecticut said: 'What are his (the surety's) peculiar equities that he should claim to direct the application of payments made and received by other parties? The creditor and debitor hal the sole right of controlling these payments and, if neither have done this, the court must do it as the rights, equities, and intentions of the parties seem to demand. The defendant is an indorser, or, at most, a surety; and this constitutes only his relationship to these debts. It has been said that sureties are to be favored in the construction and enforcement of contracts. But we cannot extend such considerations to case like the present. To do this would be to defeat the object and aim of suretyship. It would be that the surety might have the money paid by his principal so applied as to leave the creditor a loser, notwithstanding his care and vigilance. This would be inequitable and we cannot direct the application of this money upon this principle. Indeed, this is a case in which, if the creditor had made no application of the payment, the court, upon equitable principles, would apply it upon the precarious debts.' Stamford Bank v. Benedict, 15 Conn. 437, at page 445.

"In accordance with the principles above stated, the sureties can have applied to the notes signed by them only the surplus, if any, after the payment of all other indebtedness of the company covered by the mortgages."

See Decision No. 1405.

Contracts: Signing Without Reading.

Judging from the expression often heard, to the effect that the speaker hasn't even read a contract signed by him, it is fair to believe that the man on the street, unless taught to the contrary by bitter

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experience, believes that the fact that he has not read a contract before putting his signature thereto is a defense to an action on such contract. The law, however, is otherwise, and the fact that a person has not read a contract which he has signed is in most instances no defense to the contract. This is so for the same reason that the law will not allow the reception of evidence of a prior or contemporaneous oral agreement varying or modifying the terms of a valid written instrument. (See the discussion in this issue of Decision No. 1399.) The contrary rule, in the eyes of the law and as a matter of fact, would throw the whole business world into confusion and leave written contracts literally not worth the paper on which they were written. In some cases of fraud exceptions are made to this rule, but they are not favored by the courts and will hardly be extended.

All of this has been so long settled by such frequent decisions that it is surprising that it should ever be questioned at this late day. However, not only do we find laymen, as indicated above, ignorant of the law on this point, but we even find lawyers occasionally questioning it and rendering it necessary for the court once again to pass on this much-settled question. So it was in the Kentucky case of McGregor v. Metropolitan Life Ins. Co., Decision No. 1406, where the court said:

"In the pleadings it is alleged that she did not read the application or receipt. This fact cannot benefit to her, for, being able to read, and an opportunity being offered to her to do so, she may not shelter behind the allegation that she failed to exercise this right. As was well said by this court in the case of J. I. Case Threshing Machine Co. v. Mattingly, 142 Ky. 582, 134 S. W. 1133: 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it or did not know what it contained. If this were permitted, contracts would not be worth the paper upon which they were written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.' The applicant then being charged with the knowledge of what the contract which she signed contained, the court did not err in refusing to permit evidence, under the circumstances, to show a different contract from that expressed in the application. It is well settled that written instruments cannot be altered or modified by any verbal statements or representations of either party in the absence of fraud or mistake in their execution, and the failure to read does not constitute a mistake within the meaning of the word as here used.

In the case of Provident Savings Life Assur. Society v. Elliott, 93 S. W. 659, 29 Ky. Law Rep. 552, this court, in discussing the effect to be given a writing into which two contracting parties have entered, quoted with approval from the case of Fowler v. Preferred Accident Co., 100 Ga. 300, 28 S. E. 398, the following: 'All oral agreements and negotiations between the plaintiff and defendant's agents, in reference to accident insurance which the plaintiff desired to procure in

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the defendant company, resulted in the plaintiff filling out and signing an application for a policy for such insurance in the defendant company, and the agent of the defendant giving the plaintiff a receipt for a certain sum on the first quarterly premium of the policy to be issued by the defendant, and were, therefore, merged in the said written instruments by virtue of the plain and familiar rule that all oral negotiations and conversations and agreements between the parties which either precede or accompany the execution of the instrument, are to be regarded as merged in or extinguished by it, and the writing is to be treated as the exclusive agreement by which the parties are bound. Therefore, whatever conclusions were reached, or stipulations agreed upon, by plaintiff and defendant's agents in the oral negotiations and conversations between them in reference to the insurance, must be considered as embraced in the written application and receipt.'

"In the case of Vansant v. Runyon, 44 S. W. 949, 19 Ky. Law Rep. 1981, in disposing of a similar question, this court quoted with approval from 1 Greenleaf on Evidence, sec. 275, the following: 'All oral testimony of a previous colloquium between the parties, or of a conversation or declaration at the time it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.'

"And in Hill's Adm'r v. Penn. Mutual Life Ins. Co., 90 S. W. 544, 28 Ky. Law Rep. 790, where the contention was that the contract of insurance became operative from the time of the signing of the application, this court said: 'The written application distinctly shows that there was to be no insurance and that the company should incur no liability until the application had been accepted and the policy issued and delivered during the lifetime of the insured and while he was in good health."

See Decision No. 1406.

Contracts: Construction.

Several times we have had occasion to discuss certain of the rules followed by the courts in the construction of contracts. We have seen that the fundamental object in such construction, the object which all of the rules are seeking to attain, is the ascertainment of the intent of the parties making the contract. If this object is kept in mind the reason of all of the rules will be clear.

The case of Baird v. Erie R. Co., Decision No. 1407, gives emphasis to an additional rule governing the construction and interpretation of contracts. It is there laid down that in considering a contract there must be taken into consideration all papers or writings constituting or intending to constitute part of the contract. It would be well even for the ordinary business man to remember this rule, since only too often has defeat been brought about by reliance on a single clause of

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a contract or on one letter of a series which constitutes the contract, while all the while there stands forth other clauses clearly overriding or modifying the clause relied upon. It is fair and reasonable that the law should be thus, for the intention of the parties is not to be gathered from one phrase or sentence, but from all of the contract, whether it be composed of one or of twenty writings. This rule laid down in the case we are discussing is but an extension of the rule hitherto considered by us to the effect that in construing a contract the whole contract must be taken into consideration, or, as it has been expressed, the court must read the contract from its four corners. We quote from the decision in Baird v. Erie R. Co.:

"It is elementary law that all of the papers constituting or intending to constitute a written agreement must be read and considered together and as one, and are to be construed in their entirety and with reference one to another."

This case also decides several other points of the law relating to contracts as well as to railroads, easements, covenants, and the reformation of instruments. Space forbids the discussion of these points at this time. The decision itself will be found reprinted in this issue.

See Decision No. 1407.

Contracts: Construction.

In the preceding note we reiterated the basic idea in all rules for the construction of contracts — the ascertaining of the intent of the parties. One of these rules we discussed there, to the effect that all writings forming part of the contract must be considered in construing it. This, it must be remembered, is but a rule for the ascertainment of the intention of the parties, and if the intention of the parties as shown in correspondence is that a formal contract should be executed at some later time and such formal contract is thereafter executed, all of the prior correspondence is merged in the written contract and can have no effect in modifying or changing the provisions thereof. Furthermore, if such formal contract never be executed, there is no contract, for the courts will never spell a contract out of correspondence which shows an intention not to contract until the execution of a formal contract. So it was decided in Lynn v. Richardson, Decision No. 1408, where the court said:

"Generally speaking if the parties intend their correspondence or oral negotiations as but steps leading up to a binding contract, no contract is made until the final consummation of the negotiations through the execution of the formal written agreement. Spinney v. Downing, 108 Cal. 666, 41 Pac. 797; Weitz v. Ind. Dist., 79 Iowa 423,

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44 N. W. 696; Works v. Bristol Co., 170 Mass. 528, 49 N. E. 918; Wood v. Edwards, 19 Johns. (N. Y.) 205; Congdon v. Darcy, 46 Vt. 478. In the Weitz Case, supra, it was said: "The defendant ought to have been permitted to plead as a defense that it was the understanding of the parties that a written contract should be entered into. If that was an agreement, surely no contract existed for building the house, unless the written instrument had been executed. It may be that the acceptance of the bid, had there been no statute requiring a contract to be made with the lowest responsible bidder, would have raised an agreement to enter into a contract. But this action is not upon such an agreement. It is on the contract to build the house, which, if there was an agreement that it should be reduced to writing, was in fact never entered into."

From a consideration of this and the preceding case it will be clear that there is no absolute, hard and fast rule which can be applied with mathematical certitude to the construction of contracts. Each case will depend upon its own peculiar facts and rules of law for the construction of contracts are merely rules of common-sense which help to make clear the meaning of the parties.

See Decision No. 1408

Contracts: Subsequent Modification of Contracts.

In the two preceding notes, as well as in the discussion in this issue of Decision No. 1399, we have considered the rule that evidence of prior or contemporaneous negotiations is not admissible for the purpose of varying the terms of a valid written contract. This is undoubtedly one of the most well-settled points in law, but it is to be carefully observed that it applies to evidence of prior or contemporaneous negotiations only. Subsequent negotiations, i. e., those entered into after the contract has taken effect, will always be received in evidence. It is always competent to show that the parties have since changed their minds and agreed to a contract different from the original one. This subsequent modification may, in most cases, be made either orally or in writing.

Unless in the modification a contrary intention is indicated the terms of the original contract will still hold in so far as they are not inconsistent with the modification. In case of conflict the modification always prevails as being the latest expression of the intention of the parties. Where the modification calls for extra work, but provides for no definite compensation, this extra work is to be paid for, and the amount of the payment is governed by the reasonable value of such extra work. The price mentioned in the original contract for similar work may be shown as some evidence of the reasonable value of the

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additional work. Such contract price is not, as a matter of law, controlling on the value of such extra work, although in practical effect it usually will be, since a jury is likely to consider that the best evidence of the reasonable value of work and labor is the value which the parties themselves have shown that they deem reasonable by insertion in their contract. These points are considered in Naylor v. Adams, Decision No. 1409, where it is said in part:

"It is a settled rule in this State that, where the terms of a special contract have been varied or modified by the agreement of the parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract. 'In such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to the jury whenever it can aid them in attaining a sound conclusion.'"

See Decision No. 1409.

Principal and Agent: Delegation of Authority by Agent: Ratification of Unauthorized Acts.

The case of Winkleblack v. National Exchange Bank of Springfield, Decision No. 1410, brings to our attention the rule of the law of agency that an agent cannot delegate his authority. The very nature of an agency bespeaks a confidence on the part of the principal in the agent selected, and hence it is an essential element of the contract that the services contemplated by the contract of agency should be performed by the person contemplated in the contract — the agent himself, and no other. This, of course, does not apply to mere clerical acts and acts of a like nature, but it invariably and strictly applies to all acts which involve the exercise of discretion on the part of the agent. Such acts he must perform himself. If he employs another, such other becomes the agent of the agent and not of the principal, and for his acts the principal is not responsible. So it was held in the case we are discussing, the court saying:

"If an agent could appoint another agent without the principal's authority, and he, another agent, and the principal should be held liable for all of them, such agglutinating would result in an endless chain of interlopers, and necessarily revolutionize all present business methods. The law is otherwise. By an unauthorized delegation of his authority, or by the employment of a subagent on his own account, the agent makes himself personally responsible for the acts of the subagent, who is regarded as his agent and not as the agent of the principal. And, as there exists no privity of contract between the principal and such subagent, there is no liability by the principal. 31 Cyc. 1429; Commercial & Agr. Bank v. Jones, 18 Tex. 811. "Dele-

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gata potestas non potest delegari." Chouteau Land & L. Co. v. Chrisman, 204 Mo. loc. cit. 378, 102 S. W. 973. The general rule is that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not intrust the performance of his duties to another without the consent of his principal; and since nearly all acts of agency involve discretion, and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself."

The principal, of course, may ratify the otherwise unauthorized delegation of authority by his agent, but in order to ratify he must have full knowledge of all the facts. Nor will a ratification be presumed from a mere retention of the benefits of the transaction where the receipt of these benefits was without knowledge of the unauthorized delegation of authority and knowledge was not had until a return of these benefits became impossible. On this point the court says:

"Nor can the bank be held to have authorized the unauthorized representations by the subagent because no knowledge is brought home to it of the acts of such subagent or of his representations. The mere fact that the principal has received or enjoyed the benefits of an unauthorized act will not amount to a ratification if he did so in ignorance of the facts nor will his retention of such benefits after knowledge of the facts amount to a ratification if at the time he acquires such knowledge and without his fault conditions are such that he cannot be placed in statu quo or repudiate the entire transaction without loss."

See Decision No. 1410.

Stoppage in Transitu.

Of great importance and value to the business world is the right of stoppage in transitu. This may be defined as the right of an unpaid seller after title has passed to the buyer and while the goods are in course of transit to the buyer to stop, by notice to the carrier, the delivery of the goods upon knowledge of the insolvency of the buyer. It will be noticed that before this right accrues five prerequisites must exist — (1) the seller must be unpaid, (2) title must have passed, (3) the buyer must be insolvent, (4) notice to stop delivery must have been given to the carrier holding the goods, and (5) the transit or carrying of the goods must not have ended. It may be added at this place that even though these five questions be present, the right may nevertheless be defeated by the endorsement over for value to a bona fide third party of the bill of lading reresenting the goods. The method of such endorsement and the effect thereof we have hereto-

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fore considered in the note beginning at page 95a of the 1910 Quarterly.

The whole right of stoppage in transitu is merely an extension of the seller's lien, which is his right to hold on to the goods while in his possession until he has received payment, unless, of course, the sale be one on credit. Each and every one of the five requisites mentioned above have been before the courts and their essentials and effects have been well-settled. Of them all, however, the one which has caused most litigation is the requirement that the transit must not have ended. Considerable ingenuity has been employed and displayed in attempting to define exactly what constitutes the ending of the transit, but no result has been reached which easily decides in advance the various contingencies which may arise. As a general thing it may be stated that where the goods have reached the end of the journey which the seller's direction to the carrier have indicated, the transit is then ended. If the goods are shipped to an intermediate point and have there arrived, the transit is ended if their further journey, or the direction thereof, depends upon the orders of the buyer but is not ended if the further journey depends on the orders of the seller.

There has further been litigation as to whether the transit has ended after the goods have physically arrived at the place of destination, i. e., the port or the railroad terminal. Generally if anything yet remains to be done before the buyer can get complete, actual control of the goods the transit is not ended, so in the late case of In re Talbot & Poggi, Decision No. 1411, where the goods had arrived at the port of destination and had been removed from the vessel by the custom authorities, in whose possession they remained, freight and duty unpaid, and without entry being made, the court held that the transit had not ended and that, therefore, the right of stoppage in transitu still existed.' The court said:

" I do not mean that mere entry without unlading is in itself enough, because such a contention is answered by Harris v. Pratt, 17 N. Y. 249, in which goods had been entered while the property was still on board the vessel, and in which it was held that the transit was not over. That this was the theory appears from the words of Judge Denio on page 262 of 17 N. Y. On the other hand, in Mottram v. Heyer, supra, Chancellor Walworth, on page 632 of 5 Denio (N. Y.), distinctly says obiter that, if the goods have once been landed, the freight paid, and entry made, the custody of the officials is for the benefit of the buyer and the transit is at an end. The language is too long to quote, but the following words are significant:

" 'And in such a case (entry under a warehousing system) I have no doubt that the right of stoppage in transitu should be considered as at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made.'

" He based his actual decision upon the rule of Northey v. Fields, supra, holding (page 360) that:

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"'The facts in evidence would have justified the jury to find that the goods were not deposited in the public store, under any warehousing provisions of the revenue law, but had been taken there by the customs house officers because the consignees had neglected to pay the duties and obtain a permit to land the goods.'

"This is also the explanation of the case by Justice Barrett in Fraschieris v. Henriques, supra, pages 259, 260 of 6 Abb. Prac. (N. S.), which is itself directly in point upon the facts at bar.

"Cartwright v. Wilmerding, 24 N. Y. 521, although a case under the factor's act, is also significant, because the question there arose as to whether the consignee had got possession of the goods, which is the determining question in stoppage in transitu. The facts were that the factors had entered the goods for warehousing, had paid the freight, and deposited them in the bonded warehouse, but had not paid the duties. It was held that the custody for duties by the government did not destroy the buyer's possession. Chancellor Walworth's dictum in Mottram v. Heyer, supra, is quoted at length apparently as though it had been part of the decision, and Justice Gould relies on it as an authority.

"I can find no contradiction anywhere in the authorities, and I believe it to be well-settled law that goods which have been unladed and remain, freight paid, in bonded warehouse after entry, are in the possession of the buyer, and that the transit is at an end. The question always is, in the words of Judge Denio in Harris v. Pratt, supra, page 252 of 17 N. Y., whether 'the goods remain in the possession of persons concerned in their transportation.' The collector holding entered goods for duties only is not such a person. The case is analogous to this: Suppose that the carrier had deposited them in a warehouse which had run up charges against them. As soon as the consignee paid the freight, and the warehouseman had attorned to him, the transitus would have been over, for the warehouseman's charges were for safekeeping and did not concern the transportation of the goods. The custody of the collector under the warehousing system is even less a charge for transportation, and entry under the statute gives the full control which would result from attornment. The question all turns on whether the collector's possession is a mere continuance of the carrier's, or is solely for the duties, leaving the consignee otherwise full jus disponendi. When the freight has been paid and the goods entered, it is the latter.'

See Decision No. 1411.

Sales: Warranty: Damages.

Several times in the past we have drawn attention to certain features of the law of sales of personal property in relation to warranties. The recent case of Mosby v. La Rue, Decision No. 1412, draws our attention to a most important branch of this department of law — the remedies accruing on a breach of a warranty. In that case it is laid down, and with this there is no disagreement, that in the case of a breach of the warranty the buyer may recover from the seller the difference

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between what the article would have been worth if it were as warranted and what it actually is worth as it stands. The court on this point says:

"Although one of the mules was unsound when delivered and afterwards died, Mrs. La Rue had used the mule from the time she got him until July 4th, and the measure of damages, if the warranty was broken, was the difference between the value of the mule in the condition he was at the time of the sale and his value if in the condition he was warranted to be. As to the other mule, it was error to tell the jury that the measure of damages was the difference in its value as it is — that is, at the trial — and its value if sound at the time of the sale. The measure of damages is the same as to this mule as to the other."

Suppose, therefore, an article is warranted as being of No. I quality. As a matter of fact it is No. 2. No. 1 is worth $100, No. 2 is worth $75. The damages of the buyer and the measure of his recovery is under this rule $25.

Many jurisdictions give the buyer still another right where an express warranty has been breached. In these jurisdictions the buyer may still sue for his damages, or, at his option, he may rescind the entire contract, return the goods and refuse payment of the price, or, if he has already paid, may recover the amount of such payment. New York has long been the exemplar in this country of the view giving a remedy in a suit for damages only, while Massachusetts is the chief of the States giving the double remedy.

See Decision No. 1412.

The Uniform Sales Act.

What has been said in the preceding note draws attention to the fact that just as the Uniform Negotiable Intruments Act has gradually been adopted by most of the States so that the law on that subject is practically uniform throughout the United States, to the great advantage of the business world, so the Uniform Sales Act, which does the same thing for the law of sales that the Negotiable Instruments Act did for the law of commercial paper, has started on its career of adoption by the various States. New York during the 1911 session of its legislature adopted the Act. Already it had been adopted in England, Connecticut, Massachusetts, Rhode Island, Ohio, Maryland, New Jersey and Arizona. Its more general enactment may be confidently expected.

For one thing, it settles the dispute noticed in the preceding note so that from now on even in New York a buyer has his two remedies on the breach of an express warranty. A copy of the Act as adopted in New York will be found at the end of this issue.

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NOTES OF RECENT CASES.

Bills and Notes: Attorney's Fees.

DANIEL v. BREWTON, 136 S. W. (Tex.) 815, upholds a provision in a note to the effect that if not paid at maturity ten per cent. of its face value may be added to the amount to be collected as attorney's fees.

Bills and Notes: Bona Fide Holder.

That there is a presumption that one who takes a note by indorsement before maturity where there is no notice of irregularity on the face of the note, is presumed to be a bona fide holder in due course, is reaffirmed in NELSON v. NATIONAL FOWLER BANK, 95 N. E. (Ind.) 269.

Bills and Notes: Bona Fide Holder: Burden of Proof.

As we have frequently stated, the burden of proving in the first instance that the holder of a negotiable instrument is not a holder in due course is on the one asserting such fact. Such burden may, however, be shifted by proving that the instrument was tainted in its inception by fraud or illegality. These rules are once more laid down in JOHNSON COUNTY SAVINGS BANK v. CAPITO, 94 N. E. (Ind.) 797.

Boycotting.

The Supreme Court of the United States in the so-called Gompers case has decided a question of the greatest importance to all employers of labor. The decision is found under the title of GOMPERS v. BUCK'S STOVE & RANGE CO., 31 Supr. Ct. Rep. 492, and holds that an injunction which enjoins the continuance of a boycott, although spoken or written words were used as one of the instrumentalities of the boycott, is not unconstitutional as impairing the freedom of the press or of speech. The length of the decision alone prevents our printing it in full.

Brokers: Commissions.

A broker's compensation is dependent upon his success, and he is not entitled to his commissions for the sale of property unless he was the procuring cause of the sale, or at least produced a person willing

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and able to purchase at his employer's terms. Such has long been the law, and so it is held in WITT v. BYRUM, 135 S. W. (Tex.) 687.

Carriers: Exemption from Loss by Negligence.

A recent Missouri decision, LEAS v. QUINCY, O. & K. C. R. CO., 136 S. W. (Mo.) 963, adopts the rule that a carrier cannot contract for itself freedom from liability for damages resulting from its own negligence or that of its servants.

Carriers: Constitutionality of a Rate-making Statute.

An important decision holding unconstitutional the Minnesota statutes prescribing freight rates for the railroads within the State, is to be found in SHEPARD v. NORTHERN PAC. RY. CO., 184 Fed. 765. Lack of space forbids our reprinting the lengthy and exhaustive opinion in this issue.

Contracts: Construction.

The rule noted by us in this issue in discussing Decision No. 1407, to the effect that in construing a contract effect must be given to every part thereof, or, in other words, that the contract must be considered as a whole, is once again laid down in NORTHERN TEXAS REALTY & CONSTRUCTION CO. v. LARY, 136 S. W. (Tex.) 843.

Implied Contracts.

In discussing Decisions Nos. 1377 and 1378, at page 133a et seq. of the July Quarterly, we stated that where services are performed which are of value to another with his knowledge and consent, the law will imply or presume a promise to pay what such services are worth. This presumption, however, as we there stated, does not exist where the parties occupy the relationship of members of the same family and the services in question are household services. This exception to the presumption is reiterated in LEGATE v. LEGATE, 94 N. E. (Ill.) 498.

Fraud:

JARRETT v. CAULDWELL, 94 N. E. (Ind.) 790, holds that fraud renders a contract not absolutely void, but only voidable, at the option of the party defrauded. This is the law as stated by us at page 81a of the April, 1911, Quarterly.

Money Paid under a Mistake of Fact.

Money paid under a mistake of fact can be recovered under certain limitations heretofore discussed by us. This has long been well-settled law, and is once more adjudicated in KENTUCKY SAVINGS BANK & TRUST CO. v. LANGAN, 137 S. W. (Ky.) 846.

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Restraint of Trade:

Finally, after much doubt and discussion, The United States Supreme Court has decided that the so-called Sherman Anti-trust Law forbids only those restraints of trade which are undue and unreasonable. This was decided in the famous Standard Oil Case, STANDARD OIL CO. v. U. S., 31 Sup. Ct. Rep. 502. As in the Gompers and Minnesota Rate Cases, lack of space forbids our printing the lengthy opinion, but the opinion of the court below, which is affirmed by the Supreme Court, is to be found printed heretofore by us as Decision No. 1244.

Sales: Price.

Where in a sale of goods no price is definitely mentioned, the law will presume that a reasonable price was intended by the parties. So the well-settled law has been and is reaffirmed in NASHVILLE, C. & ST. L. RY. v. WOOD, 54 So. (Ala.) 753.

Trademarks.

A. J. REACH CO. v. SIMMONS HARD WARE CO., 135 S. W. (Mo.) 503, holds that geographical or descriptive words cannot be appropriated as trademarks.

Sunday Contracts.

The validity of a law rendering void all contracts made on Sunday is upheld in O'BRIEN v. SHEA, 95 N. E. (Mass.) 99.

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Accord and Satisfaction: Check "in Full Payment."

At page 17a of the October (1910) Quarterly and page 2a of the October (1911) Quarterly we discussed the effect of the acceptance of a check marked "in full payment" or "in full settlement" where the check was for a smaller amount than was claimed to be due by the payee thereof. We saw that generally such acceptance acts as a bar, and the payee will be estopped from suing for any balance which he claims was due. This, however, is not an absolute rule of law, and the payee may recover the balance due him if he can show that the acceptance of the check was not made with the intention of settling the whole matter. Such was held to be the case in Siegle v. Des Moines Mutual Hail Ins. Ass'n, Decision No. 1414, where there was a dispute as to the amount of the loss under a policy of insurance. The company sent the insured a check for a less amount than he claimed, and marked the same "This check accepted as payment in full for all claims to date." The assured indorsed the same as follows: "Accepted in part payment of loss by payee." The court, governed to some extent by a local statute, held that such an acceptance showed an intent not to accept the check in full settlement, and would not bar the payee from establishing and recovering the full amount of his loss. Said the court:

"A dispute arose between the insurance company and the assured in relation to the adjustment that was made of the loss. No question arose but what the loss was adjusted by the assured, and an authorized adjuster sent by the company. The company claimed the loss was adjusted at $400, and the assured claimed that it was adjusted at $925. Under such circumstances, the company wrote the policy

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holder, and inclosed a check, which, with a balance due the company for premium, amounted to $400. The check recited on its face: 'This check accepted as payment in full for all claims to date.' The policy holder cashed this check at his local bank, and, in doing so, he indorsed same: 'Accepted in part payment of loss by payee. Chris Bauer.' The jury evidently found that the loss was adjusted at $925. It is unnecessary to review the testimony in full; it was ample to sustain such a finding.

"The appellant contends that, by accepting and cashing the check conditioned as such check was, the policy holder satisfied the debt, whether it was $400 or $925. The respondent contends that, regardless of the condition attempted to be attached to the check, the payee had a right and the power to qualify his acceptance of the check, and receive same in part payment; and respondent further contends that, even if the check had been cashed without any attempt to qualify its acceptance, the acceptance and cashing of such check would not have amounted to an accord and satisfaction, as there was absolutely no consideration therefor. The respondent is clearly correct in this last contention, under the law as recently announced by this court, in the case of Hagen v. Townsend & White, 131 N. W. 512, wherein the facts were analogous to those in this case, unless section 1180 of the Revised Civil Code applies: Such section provides: 'Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.' This check was not 'accepted in writing' in satisfaction of the disputed claim; as a matter of fact, the assured by his act refused to so accept same. His cashing of such check, without accepting same in full of his debt, may have been a wrongful conversion of the check; but it certainly was not an acceptance of $400 in satisfaction of the claim."

It is interesting to note, however, that the court says that, while the acceptance in this case could not constitute an accord and satisfaction, because there was no intent to receive the check in full settlement, nevertheless the payee in using the check in violation of the intent of the maker was probably guilty of conversion. As we have said before (page 3a, October (1911) Quarterly): "It is extremely unsafe for any one to retain a check marked as described above (i. e., "in full settlement") unless he be satisfied to accept it as a settlement in full."

See Decision No. 1414.

Accord and Satisfaction: Check "in Full Payment."

At first sight the case of Worcester Color Co. v. Henry Wood's Sons Co., Decision No. 1415, appears to be in conflict with the case discussed in the preceding note, Decision No. 1414. In Decision No. 1415 the court says:

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"The proposition that the acceptance and collection of a check, proffered upon condition that it is in full settlement of an unliquidated claim, even though accompanied by protestations that it is not so received, bars any attempt to collect the balance, is supported by the great weight of authority."

A close examination of the case, however, reveals that it is not really in conflict with the law as previously laid down by us. In the first place, the remarks of the court just quoted were not necessary to the decision of the case. In other words, they were dicta, and hence not binding as an authority. In the second place, in the succeeding paragraph, the court qualifies the general rule as laid down by it in the following words:

"It is not every use of the words 'in full to date' or equivalent phrases which constitutes an accord and satisfaction in connection with the payment of a controverted claim. Many cases have arisen where the conditions have been such as make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has been made."

The facts in the case as stated by the court were as follows:

"On March 19, 1906, the defendant ordered of the plaintiff six barrels of Milori blue, and on March 21, 1906, 226 pounds of Chinese blue, which were shipped on these days respectively. On March 28, 1906, a written contract was made by which certain machinery and other chattels were sold by the plaintiff to the defendant for $5,000 to be paid in instalments. On the same date, but by a separate transaction, the defendant agreed to buy of the plaintiff a lot of pulp blue. The pulp blue was invoiced and shipped on April 16, 1906, in three different items, the prices charged aggregating $532.07. Thereafter the defendant claimed that the shipments of March 19th and 21st were included in the contract of March 28th, and that the $5,000 therein stipulated was to pay for the earlier sales. It further claimed that the pulp blue was larger in quantity and poorer in quality than had been represented, while the plaintiff asserted that it corresponded with the representation both as to quality and quantity. There were communications between representatives of the plaintiff and defendant touching these matters. Ultimately the defendant paid the $5,000 called for by the written contract of March 28, 1906, but did not pay for the invoiced goods. On December 24, 1906, the plaintiff sent the defendant a corrected bill for the pulp blue, reducing it by $210.76, and making the total $321.31, together with a letter explaining that the reduction was made in accordance with a letter of May 1, 1906, from plaintiff to defendant, in which it was stated that the reduction in price was made 'with the understanding that all other payments for material will be paid for according to invoices and contract.' On January 11, 1907, the plaintiff wrote the defendant again asking for a remittance. The defendant made no reply to either of these communications until March 13, 1907, when it returned the corrected bill for the pulp blue invoice of April 16, 1906, showing the amount

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due to be $321.31, together with a check for that sum, on which was written 'in full to date," and a letter saying, 'Enclosed please find check for your account in full $321.31.' The letter did not refer specifically to the invoices of March 19 and 21, 1906. Thereupon the president of the plaintiff after consultation with his attorney drew a pen through the words upon the check, 'in full to date,' collected it in ordinary course and sent the receipted bill to the defendant with a letter in which he said that the check was in settlement of the April 16, 1906, invoice and was not in full for all claims and asking remittance for the items here in litigation."

It was held that even though the check bore on its face the words "in full to date," the circumstances were such that the plaintiff was justified in believing that it had reference only to the invoice for the blue pulp, and that, therefore, it was a bar to any suit on that claim alone and not to a suit for the price of the Chinese and Milori blue. This is in exact accord with what we have hitherto seen — that whether a check marked "in full payment" is valid as an accord or not depends on the facts of the case, and is a question of fact rather than of law.

It will be noted, however, that the court holds that the act of the plaintiff in crossing from the check the words "in full to date," in nowise affected the rights of the defendant. This is probably in conflict with Decision No. 1414, but the conflict is not in the general principle, but merely in the interpretation of the effect of a fact.

See Decision No. 1415.

Banks and Banking: Payment of Checks.

The holder of a check, even though he be a holder in due course, acquires no rights whatsoever against the bank on which the check was drawn. If the bank refuses to pay the same the holder has no cause of action against the bank even though the refusal was wrongful. Not until the bank has accepted the check or certified it can the holder acquire any rights against the bank.

The depositor, however, whose check is wrongfully refused payment is on a different footing. With him the bank has entered into a contract to pay any check drawn by him which is properly presented and for which he has sufficient funds. This contract of the bank is obviously broken when there is a wrongful refusal by the bank to pay a check of its depositor. Consequently though the holder of the check has no action against the bank, the depositor has, and may recover any damage caused him by reason of the wrongful dishonoring of the check.

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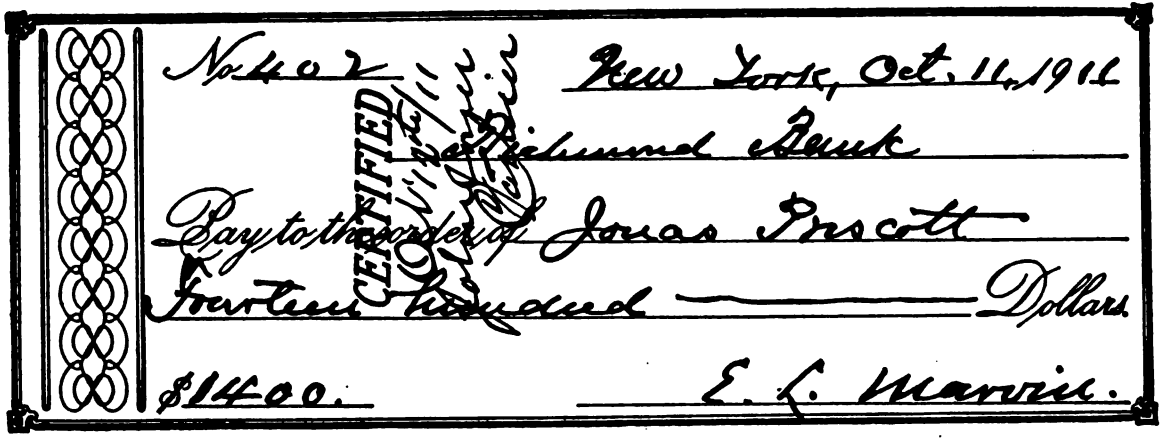
No 402 New York, Oct. 11, 1911

CERTIFIED Oct 11 1911

National Bank

Pay to the order of Jonas Prescott

Fourteen Hundred ——— Dollars.

$1400.00 E. L. Harris.

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Illustrating liability of bank that certifies raised check.

A bank in certifying a check does not warrant that the amount has not been raised.

If this check had been raised from $14 to $1400 before certification, the bank would be held for but $14 though the last indorser had paid $1400 for it on the strength of certification.

If the bank had paid $1400 after certification, it could recover $1386, the amount raised.

McMaster's Commercial Digest.

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Before even the depositor, however, can sue the bank he must show that the check was properly presented, which, of course, includes proper indorsement. If the depositor does not show that all the steps necessary for a proper presentment of the check were taken he loses his suit. So it was held in Harden v. Birmingham Trust and Savings Bank, Decision No. 1416, where the court said:

"In order to fix a liability, as for breach of duty, on a bank for a failure to pay a check of a depositor drawn in favor of another person, it must appear that the check was presented at the proper time and place, and properly indorsed by the payee, and, if it has been transferred by the payee to another, then it should be indorsed by such other person also."

See Decision No. 1416.

Banks and Banking: Payment of Check.

The case of S. Weisberger Co. v. Barberton Savings Bank Co., Decision No. 1417, was an action brought by a depositor against a bank. The facts as stated by the court were as follows:

"At the trial in the Court of Common Pleas, some of the facts were agreed upon, and they show that, at the date of the check mentioned in the petition, the plaintiff in error was indebted to one Max Roth, of New York city, in the sum of $122.13, and that his place of business at that time was No. 48 Walker street of that city. To pay the above indebtedness the plaintiff in error, on the 13th day of January, 1906, drew its check of said amount, on the defendant in error, in favor of and payable to Max Roth, in the following words: 'Barberton, O., 1 — 13, 1906. Pay to the order of Max Roth ($122.13/100) one hundred twenty-two 13/100 dollars. The S. Weisberger Co. To the Barberton Savings Bank, Barberton, Ohio.' This check, with a letter signed by the firm, was placed in an envelope, which was addressed to Max Roth, 48 Walker street, Cleveland, Ohio, instead of Max Roth, 48 Walker street, New York city. The letter, so addressed and containing the check, shortly after it had been mailed to Cleveland, was delivered by the post office authorities to one claiming to be Max Roth, who lived or roomed on Henry street in the city of Cleveland. It appears that his name was Max Roth, but not the Max Roth to whom plaintiff was indebted, and whose place of business was 48 Walker street, New York city. The Cleveland Max Roth, to whom the letter containing the check was delivered, took the check to a saloonkeeper in Cleveland, with whom he was acquainted, and after indorsing his name, Max Roth, on the back of the check, received the cash for the same from the saloonkeeper, whose name is B. Schoenfeld. The latter indorsed and delivered it to the Cleveland Trust Company, which later indorsed and deposited it with the Union National Bank of that city, by which the check was presented to defendant bank for payment, and it was paid and charged to the account of plaintiff."

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The court held that the mispayment by the bank was caused by the negligence of the depositor in wrongly addressing the check, and on this ground denied recovery, saying:

"In the case at bar, it appears that neither the depositor nor the bank intended to commit any wrong, and we may apply a rule the substance of which is that, where one of two innocent parties must suffer because of a fraud or forgery, justice imposes the burden upon him who is first at fault and put in operation the power which resulted in the fraud or forgery. We decide this case on its own puculiar facts, and make no search for or examination of reported cases, and affirm the judgment of the lower court."

It is to be noted that the court explicitly refuses to lay down any general rule and merely decides on the particular facts before it that the plaintiff could not recover. It seems to us that this holding, even though limited to the particular case, is incorrect.

It is perfectly true that the plaintiff was negligent in addressing the check to Cleveland instead of New York. Even granting that this negligence breached a duty owing from plaintiff to defendant, there is another well-settled rule of law which to our mind should defeat the claim of defendant. Even though a man be negligent he is not necessarily liable for each and every result of his negligence, but only for the natural and probable results. It seems to us that the depositor was not bound to foresee that the wrongful recipient of the check would commit a crime by forging the indorsement, and that therefore this wrongful indorsement which caused the loss was not the natural and probable result of the plaintiff's carelessness in misdirecting the check. It has been so held in New York and several other States. This being the law, the case stands merely on the ordinary ground of a bank paying out money on a check with a forged indorsement, and, to our way of looking at it, recovery should have been allowed.

See Decision No. 1417.

Bills and Notes: Contracts: What Law Governs.

It is well settled that the law of the place where a contract is made governs in so far as questions affecting the legality and interpretation of the contract are concerned. This is reaffirmed in Walker v. Lovitt, Decision No. 1418, where the court said:

"The rule is well settled that the validity, construction, and obligation of a contract must be determined by the law of the place where it is made or is to be performed. The law of the place becomes a part of the contract, and the courts of another jurisdiction will enforce it in accordance with its legal effect where made or to be performed."

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There is sometimes confusion as to the exact place where the contract is made. It is not necessarily the place where the contract is signed, dated or written, but it is the place where the contract goes into effect. For example, a note is dated in Pennsylvania and written and signed in that State, but is delivered to the payee in New Jersey. Since the note does not take effect until delivery, it is the place of delivery which determines the place of the making of the contract, and as this place was New Jersey, the note would be a New Jersey contract, notwithstanding the execution of the note in Pennsylvania. So the law is reaffirmed in Walker v. Lovitt, where the opinion reads:

"The place where a contract is made depends, not upon the place where it is actually written, signed, or dated, but upon the place where it is delivered, as consummating the bargain."

In this case the court further holds that where a contract is silent as to the place of performance and there are no special features in the case indicating any particular place for performance, the place for performance will be the place where the contract was made. We quote the court:

"When a contract for the payment of money is silent on the subject, the place of payment is presumed to be the place of making, and the debtor must seek the creditor at his domicile or place of business."

See Decision No 1418.

Bills and Notes: What Law Governs: Negotiability: Attorney's Fees.

In accord with the principles of law discussed in the preceding note is the case of Mackintosh v. Gibbs, Decision No. 1419, where the court holds that the liability of an indorser who indorsed in New Jersey a note made and delivered in California was to be determined by the law of New Jersey. The court said:

"We concur with that court in the view that the question of the liability of the defendants upon the note depends upon the effect that the law attributes to their act, and that such effect is to be determined by the law of the State of New Jersey, where the transfer of the note was made."

We have several times discussed the question as to whether a provision in a note providing for the payment of attorney's fees in case of default impairs the negotiability of the instrument. Some States hold that such a provision renders the amount of the note uncertain and therefore destroys the negotiability. Other States hold that the amount to be paid is certain, and that until after default the principal

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sum is all that is due, and that the question of negotiability concerns itself only with the instrument before maturity. This latter view is adopted in Decision No. 1419, where the court says:

"The effect of a provision for attorney's fees, to be added in the event of suit brought, has given rise to some difference of opinion, but the greater weight of authority, and also the better reasoning, as we think, is in favor of the negotiability of notes containing such a provision, which becomes effective only in case of default in payment of the note at maturity."

In this case the note contained the further provision that in the case of default in the payment of any instalment of interest the whole note would become due at the option of the holder. It was held that this provision did not impair the negotiability of the instrument. The court said:

"Our previous statute was the 'Act concerning promissory notes,' etc., approved March 27, 1874 (2 Gen. Stat. 1895, p. 2604), the first section of which traces its origin to the Act 3 & 4 Anne, c. 9, § 1. Under the latter statute it was long ago held in England that a note payable in instalments was negotiable (Oridge v. Sherborne, 11 M. & W. 373), and that a condition that the whole amount should become immediately payable on default in the payment of a single instalment did not destroy its negotiability. Carlon v. Kenealy, 12 M. & W. 139; 13 L. J. Exch. 64. The same rule obtains generally in this country. Chicago Railway Co. v. Merchants' Bank, 136 U. S. 268, 284, 10 Sup. Ct. 999, 34 L. Ed. 349; I Randf. Comm. Paper, § 12; 7 Cyc. 599."

See Decision No. 1419.

Bills and Notes: Negotiability.

In Holliday State Bank v. Hoffman, Decision No. 1420, a note was given which contained a reference to certain collateral security given and also the following provision: "If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded, additional security to the satisfaction of said holder; otherwise this note shall mature at once." The note was held to be non-negotiable for two reasons. In the first place, said the court, it contained a provision for the doing of something other than the payment of money, i. e., the delivery of additional security, and in the second place, the time of its maturity was uncertain. On this latter ground the court analyzed the difference between the provision in the note in suit to the effect that on depreciation in the value of the security the whole note should become due and provisions similar to the one discussed in the preceding note to the effect that in case of default in payment of any instalment of interest the whole note

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should become due. In the latter case the time of payment is certain, and it can be hastened only by default on the part of the maker, while in the former case the whole question of the date of maturity is at the option of the holder. Hence the court, while approving the law as laid down in the preceding note, held that the note in suit was non-negotiable by reason of uncertainty as to the time of payment. The court said:

"The provisions of the Negotiable Instruments Law, which it is claimed are applicable to the note, are as follows:

"'An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

"'The sum payable is a sum certain within the meaning of this act, although it is to be paid: (1) With interest; or (2) by stated instalments; or (3) by stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity.

"'An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: (1) At a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

"'An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: (1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal.' Sections 5254, 5255, 5257, and 5258, Gen. Stat. 1909.

"The defendant contends that under these provisions of the statute the note is non-negotiable for three reasons: (1) It is not for a sum certain; (2) it is not due at a fixed or determinable future time; (3) it contains promises to do acts in addition to the payment of money.

"If for any of the reasons suggested the note is non-negotiable, the case should have gone to the jury on the evidence offered in support of the plea of a failure of consideration, and, on the other hand, if it be held negotiable it was error to direct a verdict in view of the de-

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fendant's evidence which tended to show that the bank was not a holder in due course. Although the failure to submit the issues of fact to the jury require a reversal, it is necessary to determine the question of the negotiability of the note.

"In our opinion the most serious objection to the form of the note, the particular provision which most clearly destroys the negotiable character of the instrument, is the agreement as to matters other than the payment of money. This is the stipulation by which the maker agrees to deliver, when demanded, additional collateral security to the satisfaction of the holder, in default of which the note shall mature at once. It would hardly be different if the note recited that it was secured by a chattel mortgage upon certain live stock, and contained an agreement that in case their value should depreciate, and the holder should deem the security insufficient, the maker would, on demand, execute and deliver to the holder a mortgage upon certain real estate for such amount as would satisfy the holder, and that otherwise the note should mature at once. Such an instrument would not be an unconditional promise to pay money, but would be a promise to do something in addition thereto, and would fall, as we think this instrument falls, within the principle settled by the case of Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313. There a note, otherwise negotiable in form, provided that the property in payment of which the note was given should remain the property of the payee, and in default of payment should be returned to the payee. The sole question involved was whether the instrument was a negotiable, promissory note. It was said in the opinion:

"'The contract stated in this instrument is not simply a promise to pay money, but a stipulation concerning the title to property, and a promise in reference to the future disposition of such property. It is essential to the negotiability of paper that there is in it but the simple promise to pay money. You may not incorporate with such a promise stipulations and agreements as to other matters, and then say that the absolute promise to pay money lifts the contract into the region of negotiable paper. This is the general rule, and whatever exceptions there may be, this is not one.' Citing 1 Daniel on Negotiable Instruments, § 59. 'Now this instrument touches other matters and contains other stipulations and provisions than those respecting the payment of money. It is a contract in respect to the title to property. It is also a contract for the possession of property, and because of these additional stipulations it is something more than a simple promise to pay money. . . . There might as well be included in one agreement a contract for the lease of real estate, or the hiring of chattels, or the performance of labor with an absolute promise to pay a sum certain at a certain time, and then affirm that by reason of this absolute promise the entire contract is a negotiable instrument. This is not the law. Doubtless many of the rules respecting negotiable paper are purely arbitrary, but nevertheless they are well settled, and ought to be rigorously enforced. Among these rules is that of the unity of the contract, the singleness of the promise to pay, and we think no departure should be made from the spirit or letter of those rules.' The doctrine of this case has been often approved. Lyon v. Martin, 31 Kan. 411, 413, 2 Pac. 790; Iron Works v.

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Paddock, 37 Kan. 510, 15 Pac. 574; Gilmore v. Hirst, 56 Kan. 626, 629, 44 Pac. 603; De Hass v. Roberts, (C. C.) 59 Fed. 853, 855; Lincoln Nat. Bank v. Perry, 66 Fed. 887, 894, 14 C. C. A. 273.

"The Negotiable Instruments Law, which is merely declaratory of the mercantile law on the subject, contains a provision which, as we construe it, makes the note in the instant case non-negotiable. Section 5258 of the General Statutes of 1909 reads: 'An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.' The section then enumerates certain things which are not to be regarded as falling within the inhibition. None of these exceptions cover such a promise as the one under consideration.

"The note is non-negotiable for the further reason that the same provision renders doubtful and uncertain the time at which it shall become due. If the maker shall fail when demanded to furnish additional security to the satisfaction of the holder, the note shall mature at once. It is argued that this is no different in principle from the provision that default in the payment of any instalment shall accelerate the maturity of the note, and cases in which we have held that a similar provision will not render the note non-negotiable. See Clark v. Skeen, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337. The Negotiable Instruments Law itself expressly declares that a negotiable instrument may contain provisions of this kind. Gen. Stat. 1909, §§ 5255, 5257. The distinction between such a stipulation and the one in question lies in the fact that in the one instance the maturity is accelerated by the default of the maker alone, and the default is to consist in his failure to pay money. Here the maturity of the note is to be accelerated by the failure of the maker to do something in addition to the payment of money, and both contingencies are made to depend upon something over which he has not the absolute control. It is within the power of the holder, by refusing assent to what the maker has done, arbitrarily to make the note due at any time between the date of its execution and six months thereafter. If the holder is not satisfied with the additional security, the note matures at once, and thus the time at which it may mature would depend upon the time at which the holder declared himself dissatisfied with the security delivered by the maker. The effect of this stipulation is to leave the time when payable uncertain and indefinite."

See Decision No. 1420.

Bills and Notes: Alteration of Instruments: Principal and Surety.

In Hess v. Schaffner, Decision No. 1421, Hy. Hess, W. F. Viereck, John Damek, Theo. Kloy and John Roesler signed a note apparently as joint makers, but actually with Hess as the maker and the rest as sureties. Before delivery of the note the name of Damek was stricken from the note. It was held that the striking of the name of Damek off before delivery did not invalidate the instrument, but served only

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to release Damek from liability so that the note became the note of the other four signers only.

It was further claimed that among the four original sureties, Viereck, Damek, Koy and Roesler, it was agreed that unless all were bound none would be, and that therefore the striking out of Damek's name released them all. The court held that the agreement between the sureties could not affect the rights of a third party who took the note for value and without notice of the agreement. Said the court:

"No agreement of the sureties among themselves, to the effect that if all of them were not bound none of them should be, would be binding upon or affect the rights of the payee of the note, unless he had knowledge or notice prior to or at the time he took the note and parted with the consideration of such agreement, and that it had been violated. 32 Cyc. 44, 45; Joyce v. Cockrell, 92 Fed. 838, 35 C. C. A. 38; Tabor v. Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; Seaton v. McReynolds, 72 S. W. 874; Bopp v. Hansford, 18 Tex. Civ. App. 340, 45 S. W. 748; Bannister v. Wallace, 14 Tex. Civ. App. 452, 37 S. W. 250.

"Appellee, when the note was presented by Hess with the names of all the appellants signed to it, but with the name Damek, which had been signed, erased, in the absence of knowledge or notice to the contrary, had the right to assume that such erasure had been made with the consent of the others. The mere fact of such erasure did not put appellee upon notice that such erasure had been made without consent of the other sureties, and released them from liability. Having signed the note and intrusted it to Hess, upon them, and not upon appellee, must fall the consequences of any violation of duty by Hess to appellants."

It is to be remembered that the law construes most strictly in favor of the surety all contracts of suretyship, and that anything done without the consent of a surety, which changes the nature of his risk, immediately releases him. Since the one taking the note in suit must have been presumed to know this rule of law, it seems to us that the striking out of Damek's name should have put him on inquiry at least as to whether or not the striking out was done with or without the consent of the other sureties. We are, of course, going on the assumption that the taker knew that in reality four of the five signers of the note were sureties. Whether he did or did not is not stated in the report of the case, but it would be a fair inference from the facts stated that he did.

See Decision No. 1421.

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Bills and Notes: Payment of Individual Debt by Corporate Check; Bona Fide Holders: Notice.

Several times we have had occasion to notice cases holding that where an individual pays an individual debt with a corporate check signed by himself as an officer of the corporation, the creditor is charged with notice, and if such payment is in point of fact unauthorized the corporation may recover the amount thereof. This rule is reaffirmed in Coleman v. Stocke, Decision No. 1422, where it is said:

"Where one receives the check of a corporation on its private funds in payment of the individual debt of the officer of the corporation who drew the check, or in payment of a debt for which such officer is obligated, he is prima facie chargeable with notice that such officer is not authorized to use the corporate funds for that purpose, and is bound to inquire as to the real situation. In other words, where such a creditor of the officer of a corporation so receives the check of the corporation for such individual debt and draws the money thereon, he does so at his peril, and is liable to account therefor in an action by the corporation itself, and, of course, in the event of its bankruptcy, at the suit of the trustee in bankruptcy, who succeeds to the rights of the corporation in the premises for the benefit of its creditors. The law will not permit corporate funds to be thus misapplied by its officers for the individual benefit of its officers, and conclude the matter as an innocent transaction, when it appears the very medium by which the payment was made conveys notice on its face to the creditor of the individual officer that the funds employed are those of the corporation."

This rule was applied to the following state of facts: One Alex. R. Meier was surety for a debt due by his brother, Fred C. Meier, to the defendant, Stocke. Stocke was pressing for his money. Finally Alex. R. Meier drew a check on the National Bank of Commerce for $16,000 to the order of cash and signed it "Meier China & Glass Co. by Alex. R. Meier, Secy. & Treas." He gave this check to Stocke, told him to deduct therefrom the amount of his claim, $3,500, and return the balance in cash. This was done. It was held that the trustee in bankruptcy of the corporation could recover the whole amount of the check from Stocke.

See Decision No. 1422.

Bills and Notes: Checks.

An example of the law's adaptability to new conditions arising in the business world is to be found in the case of In re A. O. Brown & Co., Decision No. 1423. In that case the question arose as to whether one who gives a check but has no funds to meet the same is guilty

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of fraud. There is no question but that as a general proposition such a transaction is fraudulent. In this case, however, it was claimed that there existed a custom in the particular business involved in many cases not to make deposits to meet checks drawn until the succeeding day, since it took a day to have the checks go through the clearing house in the usual course of business. This being so, it was claimed that the giving of the check was not a representation that there were funds in the bank to meet it, as is generally the rule, but only that there would be funds to meet it when presented in the usual manner. The court considered this contention, and, while it did not sustain it in this particular case, strongly intimated that under some conditions it might be sustained. On the facts in the case under discussion the court held that the giving of the check was a representation that there were funds in the bank to meet it, and that since there were not such funds the giving of the check was fraudulent. The court said:

"It now appears that when Becker gave the check to Mrs. Parker there were no funds in his account. The question is what Becker's representation really was, and what Mrs. Parker had the right to believe was involved in giving her a check at all. If the natural meaning of the transaction was that there was money there at that time subject to withdrawal by the check, then she may rescind, for confessedly that representation was untrue. If, on the other hand, the representation is only a promise that there will at some future time — that is, when she chooses to present the check, be funds to meet it — then there is no misrepresentation of fact unless Becker at the time did not intend to put the drawee in funds, before the check should be presented, of which there is no evidence.

"Now a check is undoubtedly a draft, and, in the case of a time draft, I suppose no one would say that there was any representation by the drawer that the drawee was in funds in præsenti. Every one knows that business usage does not contemplate that the drawee shall be in funds until the draft is due. The trustee makes a plausible argument, through what he says is the common custom among brokers in meeting out of town checks upon their branch officers. He says that it is customary for the branch house to wire the New York house that a check has been delivered, and for the broker to put the drawee bank in funds by wire before the check goes through the clearing house. It is doubtless the custom to deposit checks and so to take twenty-four hours to cash them, and, if that were a part of the engagement so that the check could not be presented for payment except at the end of twenty-four hours, then the check would properly be held to be a time draft; and, though the time would be short, it would be also quite proper to hold that to give the check was no more than a representation that at the end of the twenty-four hours the drawee would be in funds. Were that the fact, it would be impossible to show fraud or a misrepresentation of facts without showing that the drawer did not intend to put the drawee in funds when he uttered the check. However, though it is the usual custom to deposit checks, it is by no

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means the inevitable custom, nor is there anything implied in the transaction to prevent the payee from going at once to the drawee's paying teller and demanding payment in cash, or requiring a certification. Unless there is some agreement to the contrary, this right of the payee gives him immediate control over the funds in the drawee's hands, and he certainly has the right to assume that the drawee will be in funds when he appears, and that the drawer so means to represent.

"In short, the period of the time of presentation of a check is by no means one day, but it is the earliest time within which the check may be presented, and that, of course, varies with the facts. In a case like that at bar, where the drawer, the payee, and the drawee all live in the same city, and where the payee may cash the check in a few minutes, the time is reduced practically to nothing, and it seems to me that the drawer must be held to represent that the drawee is already in funds, unless he indicates in some way that the check is not to be presented at once. It is of no consequence that the payee may wait and so take a chance of the drawer's and the drawee's continued solvency. If the check means that the drawee is in funds now, and if the payee accepts it as cash, he may rescind if he was misled, however innocently."

See Decision No. 1423.

Carriers: Delivery to Wrong Person.

Equitable Powder Mfg. Co. v. St. Louis & S. F. R. Co., Decision No. 1424, holds that in no case and under no circumstances can a carrier excuse a delivery of goods to the wrong person. The court says:

"A carrier acts at its peril in the delivery of goods, and no circumstances of fraud or mistake will excuse a delivery to a person other than the consignee. Little Rock, Miss. Riv. & Tex. Ry. Co. v. Glidewell, 39 Ark. 487."

While this is true generally speaking, there are a few qualifications which have been made by various decisions. The reasoning of and the reasons for these decisions are too theoretical and too technical for a discussion in a magazine of this character, and we shall content ourselves with merely giving the facts and the holdings in several cases where the question of delivery to the wrong person was raised.

In one case a person acting under the name of S. H. Wilson & Co., at Oswego, ordered material from the plaintiff at Syracuse. Plaintiff did not know of any S. H. Wilson & Co., but sent the goods addressed to S. H. Wilson & Co. at Oswego. On their arrival the railroad delivered the goods to a person calling for goods addressed to S. H. Wilson & Co. without requiring any identification. The person so calling was a swindler. It appeared that he was the same man who

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wrote for the goods in the first place, and that no such firm as S. H. Wilson & Co. existed. It was held that the railroad was liable for a misdelivery. (Price v. Oswego & Syracuse R. R. Co., 50 N. Y. 213.)

In Samuel v. Cheney, 135 Mass. 278, goods were ordered by letter by "A. Swannick, P. O. Box 1595, Saratoga Springs, N. Y." Plaintiff sent the goods so addressed, but thought he was sending them to an Arthur Swannick of Ash and Franklin streets, Saratoga Springs. The latter was a reputable merchant. The carrier delivered them to the A. Swannick who wrote the letter. In this case the carrier was held free from liability.

In Edmunds v. Merchants' Despatch Co., 135 Mass. 283, a swindler represented himself in person to be Edward Pape. The goods were sent addressed to Edward Pape, but were delivered to the swindler. The carrier was held to be not liable. Whereas in the same case it was decided that where the swindler represented himself to be not Edward Pape, but the brother of Edward Pape, acting for Edward Pape, and the goods were delivered as in the first instance, the carrier was liable.

In McCulloch v. McDonald, 91 Ind. 240, goods were addressed to "E. Cline, Walnut and Jackson Sts." They were meant for E. Klien of Campbell and Walnut streets. The carrier delivered them to I. Kline of Walnut and Jackson streets. Held — the carrier was liable.

Singer v. Merchants' Despatch Co., 191 Mass. 449, discloses a peculiar state of facts. In that case L. Singer of Boston send goods billed to "L. Singer, Springfield, Ill.," meaning to consign them to themselves. The carrier delivered them to an entirely different L. Singer, doing business at Springfield, Ill., and it was held that such delivery freed the carrier from liability.

The general rule to be deduced from these cases would seem to be that the carrier is relieved from liability by delivery of goods only when the goods are delivered to the right person or when they are delivered exactly in accordance with the directions of the consignor. In the last case the fact that the person who received the goods was not the one intended by the consignor makes no difference. As was said in Singer v. Merchants' Despatch Co., supra, "What a consignor in fact means if not communicated to the carrier is not material. The rights of the parties depend upon what is communicated to the carrier."

See Decision No. 1424.

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Carriers: State Regulation.

Every day the question of the right of the State to regulate business is becoming of greater interest, of more importance. Conditions have changed since the old days of small establishments competing freely against each other and the huge corporations combining and systematizing various conflicting interests and necessarily limiting, if not eliminating, competition, has become an accomplished fact. In the eyes of the old common law any limitation whatsoever of competition was an evil to be combatted by all the machinery of the law, and certain interesting statutes in force and sometimes enforced at the present day are merely survivals of the medieval idea. The more advanced and intelligent of our judges and legislators have become convinced that facts and the tendencies of the modern commercial world have antiquated the ancient regime, and that we are on the eve of a new era in which the law will readjust itself to the surrounding world and vindicate once more its elasticity and reasonableness.

In the old days regulation of a business by the State was unheard of. "Phohibit — yes! but regulate — never!" seemed to be the watchword. To-day, however, we are beginning to realize that to regulate is about all that we can do and that the solution of our industrial problem lies in intelligent and even-handed supervision and regulation by the State and not in destruction or confiscation.

This principle has become firmly established in the law in so far as those corporations engaging in business of a public nature are concerned. The late case of State v. Corvallis & E. R. Co., Decision No. 1425, says:

"Considering the principal inquiry, it is a well-recognized rule of law that when property is set apart by its owner to a public use he, by the dedication, impliedly agrees to be governed by such reasonable regulations as the public may adopt that are designed to promote the common convenience or to advance the general welfare. 'Property,' says Mr. Chief Justice Waite, in Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, 'does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' From the principle thus announced it follows that the legislative assembly of a State, as the agent and representative of the public, may enact any reasonable regulation ordaining, within the limits of its jurisdiction, rates for the transportation of freight and passengers, or prescribing any reasonable rule governing the service to be performed by the carrier, when such rules neither interfere with interstate traffic nor amount

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to a taking of property for a public use without just compensation, nor violate any express charter provision granted by the State to the corporation."

There is already a well-defined tendency discernible to broaden this rule, and to apply it to all enterprises of large extent, irrespective of the nature of their service.

Decision No. 1425 gives a concrete example of the development of the law. Originally there was no power in the State to compel a railroad to open and operate a station or waiting room. Even to-day, unless a statute be enacted on the subject, there is no such power. But the legislature may enact that adequate stations be established and maintained, and may give the enforcement of this duty over to a railroad commission. Such a statute is a valid exercise of the State's power over carriers, and is not invalid as an unconstitutional delegation of the State's legislative power. So it has often been held, and so it is once more laid down in State v. Corvallis & E. R. Co., where it is said:

"At common law it was not incumbent upon a common carrier to provide depots for the accommodation of arriving or departing passengers, or to supply warehouses for storing freight received for transportation or to be delivered to a consignee. 26 A. & E. Ency. (2d ed.) 497; Nashville, Chattanooga & St. Louis Ry. Co. v. State, 137 Ala. 439, 443, 34 So. 401; People v. New York, Lake Erie & Western Ry. Co., 104 N. Y. 58, 9 N. E. 826, 58 Am. Rep. 484, 485. Such duty may be imposed, however, by statute, and a legislative assembly by a proper enactment can compel a railroad company to erect and maintain reasonably suitable structures for the benefit or convenience of the public. Beale & Wyman, Railroad Rate Regulation, § 224; 2 Elliott, Railroads (2d ed.), § 762; Commonwealth v. Eastern Ry. Co., 103 Mass. 254, 4 Am. Rep. 555; Railroad Commission v. Portland & Oxford Central Ry. Co., 63 Me. 269, 18 Am. Rep. 208. The duty of erecting suitable depots having been imposed upon railroad companies by an act of the legislature, the power to determine when the enactment shall be enforced at a given place may lawfully be delegated to a railroad commission. Minneapolis & St. Louis R. Co. v. Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614. In State ex rel. v. Atlantic Coast Line R. Co., 51 Fla. 578, 592, 40 So. 875, 880, it was ruled that a railroad commission could exercise such powers as were expressly or impliedly granted; the court saying: 'The Railroad Commissioners of Florida are statutory officers, whose powers are those, and only those, which are conferred upon them expressly or impliedly by the statutes of the State.' In Railroad Commissioners v. Oregon R. & Navigation Co., 17 Ore. 65, 75, 19 Pac. 702, 706, (2 L. R. A. 195), in construing an act creating a board of railroad commissioners, it was ruled that no authority was thereby conferred to require a railroad company to refund to a shipper a sum of money alleged to have been exacted in excess of a reasonable charge for shipment. In deciding that case, Mr. Chief Justice Thayer said: 'The jurisdiction of such

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commission is not given by implication. Commissions of that character are mere creatures of statute, and possess no power except what the statute expressly confers upon them.' In State v. Rogers, 22 Ore. 348, 357, 30 Pac. 74, 75, Mr. Justice Bean, referring to the enactment construed in the preceding case, observes: 'This law provided for two commissioners to be appointed by the governor, who should have only supervisory powers over railways, and with no authority to in any manner regulate or fix freights or fares for carying either freight or passengers.'"

See Decision No. 1425.

Chattel Mortgages: Sales.

In Wasey v. Whitcomb, Decision No. 1426, one Vaughan was a retail dealer in pianos. He entered into an agreement with defendant, Whitcomb, whereby Whitcomb should pay for pianos ordered from the manufacturer and consign the same to Vaughan. Vaughan was to sell the same, account for the same to Whitcomb, and, as they were sold, Vaughan promised to reimburse Whitcomb from the proceeds of such sale, retaining for himself as commissions any excess over the cost of the price received on such sale. Vaughan was thrown into bankruptcy, and this suit was between his trustee and Whitcomb for certain of the pianos which were in the possession of Vaughan in pursuance of the above arrangement at the time of the filing of the petition in bankruptcy. The trustee claimed that the pianos were the property of Vaughan, and therefore of the trustee, on the ground that the transaction really constituted a sale to Vaughan of the pianos, with the agreement between Vaughan and Whitcomb acting as a chattel mortgage back to Whitcomb to secure his advance. The facts that Vaughan sold the pianos in his own name; that Whitcomb was to receive back only his advancements; that Vaughan was to pay interest on these advances; and that the pianos were consigned from the manufacturers direct to Vaughan were cited in support of this contention. Whitcomb, on the other hand, contended that the transaction was a sale to him of the pianos and that Vaughan was merely his agent selling the pianos on commission for him. The court upheld this latter view of the transaction, saying:

"We will now notice some of the claims made by complainant as to the legal effect of the contract and consignment receipts. Among other things, complainant's counsel contend that under the contract defendant's only interest in a piano was the amount of advancement, with interest, and that Mr. Vaughan had the right at any time, upon repayment to the defendant of the amount to his advancement, with interest, to thus extinguish all of the defendant's interest in the piano. We cannot agree with these propositions. It seems to us clear that

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under the terms of the agreement the defendant owned those pianos, and that Vaughan was to sell them for him as his agent, and that defendant was entitled to have each piano contract stand until the purchaser paid up, so that he should have interest on his money during that period. In other words, that the defendant owned the contracts, and was not bound to sell them to Vaughan, or any one else. It is a familiar principle that an agent to sell may not sell to himself. By the agreement, the defendant agreed to 'consign for sale,' and Vaughan agreed 'to accept on consignment for sale, pianos, organs and other musical goods at the price and on the terms and conditions hereinafter agreed upon.' 'To consign,' in mercantile terms, is ordinarily to send or transfer goods to a merchant or factor for sale, and the consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted, and the term implies an agency. The very term 'consignment' means title in the consignor. Dittmar v. Norman, 118 Mass. 324; 6 Am. & Eng. Encyc. of Law (2d ed.) 798. This indicates to our mind that the defendant was to be the owner of the instruments, and that Mr. Vaughan was to deal therewith as defendant's agent. And this appears by other portions of the same contract. By the second paragraph of the contract, Vaughan is required to report all sales promptly, and settle for cash sale immediately. By the fourth paragraph, all contracts and lien notes accepted in settlement of sales were to be indorsed by Vaughan to the defendant, until the amount due for the instrument it represented was settled for in full, with interest as provided. The fifth paragraph provides that Vaughan's recompense or commission should be the amount for which said instrument was sold in excess of the cost of said instrument, as represented by a consignment receipt given by Vaughan to defendant, which receipt formed a part of the contract. By the eighth paragraph Vaughan agreed to make all collections free of expense to defendant, and to report the same, whenever requestd so to do. By the ninth paragraph, Vaughan agreed to make report of all stock on hand, or in propspective customers' hands, whenever requested to do so. It seems to us that none of these provisions can be given force or effect, unless defendant is held to be the owner, and Vaughan to be acting as a mere agent to sell.

"Complainant's counsel also contend that the defendant, although claiming to be the owner, had no power to extinguish Vaughan's interest in the piano, for the latter might retain possession thereof, and have the right to sell the piano for any price he deemed fit, and Mr. Vaughan's so-called "commissions" were not measured as commissions always are, by a percentage upon the purchase price, but his commissions were all he could get for the piano over and above the defendant's advancement, with interest. We think it already appears that Vaughan was not at liberty to sell for any price less than that specified in the consignment receipt. And counsel's statement that defendant had not power to extinguish Mr. Vaughan's interest in the piano we cannot accept, in view of the eleventh paragraph of the contract, which provides that: 'Party of the second part agrees to surrender to the party of the first part or his authorized agent, on thirty days' notice all unsold instruments, held on consignment under the terms of this agreement, and to deliver same to any address he may

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designate in the city of Detroit free of expense to the party of the first part.' In other words, defendant, on thirty days' notice, might at any time absolutely terminate Vaughan's possession of and claims in every unsold instrument in Vaughan's possession.

"Neither can we accede to the proposition that commissions are always or usually on a percentage basis. Under the title, 'Factors or Commission Merchants' (12 Am. & Eng. Encyc. of Law [2d ed.] 669), appears the following: 'Amount of compensation. In the absence of a special agreement, a factor is entitled, upon the performance of his services, to the usual and customary commissions upon the amount of goods sold.' It is true that in all his dealings as agent of various piano manufacturers Mr. Vaughan received all he could get over and above the amount stated in the consignment, or bill, as the purchase price. Moreover, it appeared in the evidence of various experts called upon this subject that this was the customary compensation or commission of piano agents everywhere.

"We do not consider it significant, as tending to favor complainant's position, that all sales were made in the name of Mr. Vaughan, or that in the sale the defendant was not treated as the owner of the piano. We understand it is usual and customary for commission merchants to sell in their own names. 12 Am. & Eng. Encyc. of Law (2d ed.) 633, and authorities cited. In Slack v. Tucker, 23 Wall. 321, 23 L. Ed. 143, Bradley, J., speaking for the court, said: 'The difference between a factor or commission merchant and a broker is stated by all the books to be this: "A factor may buy or sell goods in his own name, and has the goods in his possession."'

"Again, it is contended by complainant's solicitor that the fact that Vaughan agreed to pay interest shows that the transaction was a mortgage, and counsel say: 'The obligation to pay interest distinctly stamps the advancement as a debt from Mr. Vaughan to the defend ant, because if the defendant was buying the piano from Mr. Vaughan, and the advancement was the purchase price, Mr. Vaughan would not be paying interest on the advancement. No one pays interest, except upon a debt or obligation he owes.' In Starr Piano Company v. Morrison, 159 Mich. 583, 124 N. W. 562, under an agreement very similar in its terms to the one we are considering, provision was made for the payment of interest, and yet that instrument was held not to be a chattel mortgage. Interest may include recompense for the use of anything that has an ascertained pecuniary value, as well as money. We think it may be gathered from the following authorities in this State that Vaughan's agreement to pay interest is not sufficient to make the transaction a chattel mortgage. Ryan v. Wayson, 108 Mich. 519, 66 N. W. 370; Stack v. Olmsted, 127 Mich. 359, 86 N. W. 851; Bunday v. Columbus Machine Co., 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475; A'Hern v. Lipsett, 154 Mich. 196, 117 N. W. 577. In every one of these cases interest was required to be paid to the seller, but it was nevertheless held that the title did not pass."

See Decision No. 1426.

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Contracts: Consideration: Good Will.

We have frequently seen that in order to suport a contract it is necessary that there be some consideration therefor. In other words, the one seeking to enforce the contract must have given up some legal right in exchange for the promise which he is seeking to enforce or the breach of which he alleges. Once there is any consideration, however, the law, in the absence of fraud, duress or mistake, will not inquire into the sufficiency thereof. That is left to the parties to the contract. So the law is well settled and so it is reaffirmed in the following language in Nelson v. Brassington, Decision No. 1427:

"The trial court found that the fair market value of the several articles of personal property sold by the respondent to the appellant approximated the sum paid as the consideration for the sale, and hence concluded that there was no consideration for the remaining part of the agreement not to enter into business within the prohibited territory. But this is not the correct test. Courts in transactions of this kind do not inquire into the adequacy of the consideration. This, in the absence of fraud or over-reaching, is solelv the business of the parties. The court inquires only into the legality of the consideration, not whether the party to be bound made an improvident bargain."

The court in this case also discusses the question of the sale of a good will of a business. That such a sale is valid and enforceable has long been the law, as we have heretofore seen, and so it is once more enunciated in Decision No. 1427, where the court says:

"One thing he sold to them was his good will; an obligation not to engage in a similar business in any of its various forms of selling and packing meats in Cordele. In the light of the testimony, there can be no question that he engaged in such business; and, instead of giving the parties with whom he contracted the advantages of his good will, he engaged in a service and occupation which directly had the effect of antagonizing and competing with their occupation, to their injury and damage, by the exercise of his skill and experience in the conduct of a similar business."

It is to be noted that the court defines good will to be: "An obligation not to engage in a similar business in any of its various forms of selling and packing meat in Cordele." It will be recalled that we, in a former issue discussed various definitions of the term "good will," and a reference to that discussion will disclose that the definition herein given does not by any means include all the features of "good will." However, as far as it goes, it is correct, and it includes all of the features necessary to the particular case before the court.

See Decision No. 1427.

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Corporations: De Facto Corporations.

A corporation is a legal entity created by the State and which the law considers a person distinct from the stockholders which compose it. In theory of law no corporation can exist without the authority of the State for its creation. Originally corporations were created by royal grant. After the war for independence corporations for many years in this country were created by special acts of the various legislatures. In later years, however, the policy has been to enact general acts, laying down certain requirements on compliance with which a corporation may be formed. It is in this manner that the great majority of corporations are formed at this day.

The question often arises as to what happens when some of the steps required by the statute have not been complied with in an attempt to form a corporation. The general rule is, that where there has been an attempt in good faith to form a corporation but there has been an unintentional omission of a step required by the law or any irregularity in the attempted compliance with the statute, a corporation *de facto*, though not *de jure* will nevertheless be created. This means that no one but the State itself can take advantage of the irregularity. The State by quo warranto proceedings may have the pretended charter declared void, which, of course, extinguishes all life in the corporation. No one else, however, can set up the defect. Hence it cannot be availed of by one seeking to avoid a contract with such *de facto* corporation, nor can the corporation itself set up the defect. For all intents and purposes the *de facto* corporation is a corporation just as thoroughly as though it were validly incorporated, subject only to the State right to declare its existence terminated. Reasons of public policy and natural justice are the grounds of this doctrine. The doctrine is thus laid down in In re Jackson Brick & Tile Co., Decision No. 1428:

"In reaching the conclusion that the claimant bank did not acquire a valid lien under the deed of trust, the referee seems to have held that the Jackson Chemical Manufacturing Company was not legally incorporated, or that by reason of irregularities attending its incorporation the company did not become a corporation de jure such as could acquire and convey title to the real estate here in question.

"The evidence, however, shows that the incorporators of this company took all the formal steps required by the statute to entitle it to a certificate of incorporation, and that a certificate in due form was issued by the secretary of state, and, although the evidence seems to show that the company had no bona fide stockholders, and that no part of its capital stock was ever paid in, it seems to admit of no doubt that the company was at least a de facto corporation, and it is well settled that the transfer of property by or to a de facto corporation

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cannot be collaterally attacked and will be held valid against all persons except the State. Finch v. Ullman, 105 Mo. 255, loc. cit. 263, 16 S. W. 863, 24 Am. St. Rep. 383."

See Decision No. 1428.

Insurance: Subrogation.

Fire insurance has been construed by the courts since its inception to be a contract of indemnity. In other words, the contract is merely to make good to the insured any loss he may suffer by reason of a fire. This it is, and nothing more. Consequently it follows that one may not make a profit out of his loss because he happens to be insured. One insured for $5,000 cannot recover the $5,000 when his loss is but $4,000. Furthermore, if one insure his building for $5,000, its full value, and it be destroyed under circumstances which give the owner a right of action against the one causing the fire, he cannot retain the $5,000 insurance money and also the amount realized from the one causing the fire. In such a case the insurer may pay the amount of the loss, prosecute the insured's right of action against the wrongdoer and hang on to the proceeds. If, on the other hand, the insurer allow the insured to prosecute his own action, the latter upon recovery will hold the proceeds in trust for the insurer. This right of the insurer is called the right of subrogation. In St. Louis, I. M. & S. Ry. Co. v. Commercial Union Insurance Co., 139 U. S. 223, the United States Supreme Court said: "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of the loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only." Though it is true, as stated in this quotation, that the right to subrogation depends upon the very nature of the relation of insurer and insured, and is independent of any contract, nevertheless at the present day it is the almost invariable practice to include elaborate provisions for substitution in the policy of insurance. The clause in the standard fire policy relating to subrogation reads as follows: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all rights of recovery by the insured for the loss resulting therefrom, and such right shall be

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assigned to this company by the insured on receiving such payment." It will be noted that should the right of action against the third party realize more than the amount of insurance paid, the insurer has no claim against the surplus. He has been made whole and the insured gets the surplus even though he thereby makes a profit.

Bearing in mind the rule that insurance is a contract of indemnity, and that it is because of this that subrogation is allowed, it is easy to see that where the insurance money plus the recovery against the third party does not equal the loss, there can be no subrogation. A house is insured for $5,000. It is worth $15,000. The house is destroyed by fire through the negligence of a railroad. The insurer pays the amount of the insurance. The insured recovers $9,000 from the railroad. The insured may keep both amounts, for even with both he is not wholly indemnified. If he had recovered $12,000 from the railroad company the insurance company could only claim $2,000 — the difference between the total amount received by the insured and the amount of his loss. So it was held in Shawnee Fire Insurance Co. v. Cosgrove, Decision No. 1429. The court said in part:

"There is no question but that the insurance company could not have brought the action in its own name. The loss was greater than the amount of the insurance. That the suit against the railroad company for the loss was properly brought by the appellees, and not by the appellant, and that, as the loss was greater than the amount of the insurance, the appellant could not bring an independent action, is indicated by Railroad Co. v. Insurance Co., 59 Kan. 432, 53 Pac. 459, and Norwich Union Fire Ins. Soc. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433. The reason for this is shown in the latter case by a quotation from an opinion by Judge Dillon in Ætna Insurance Co. v. Hannibal & St. Joseph R. R. Co., 3 Dill. 1, Fed. Cas. No. 96: 'If one insurer may sue, then if there are a dozen, each may sue; and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since, both in Great Britain and in this country.' It is also held in these cases that if the insured having been paid his loss, or a portion of it, by the insurer, recovers an amount from the wrongdoer in excess of the amount of the balance of his loss and expenses of suit, after deducting the amount paid him by the insurance company, he holds such balance in trust for the insurer; but it is not held in these cases that the insured is entitled to retain the entire amount of his loss and expenses of suit and also the amount paid by the insurance company, nor that the insurer is powerless to protect its interests in the action."

See Decision No. 1429.

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Insurance: Subrogation: Mortgages.

A further illustration of the working out of the doctrine of subrogation, which we discussed in the preceding note, is to be found in the late case of Leyden v. Lawrence, Decision No. 1430. In that case the property insured was subject to a mortgage, and the mortgagee took out the insurance thereon for his own exclusive benefit, paying for the same out of his own pocket. It was held that after a loss by fire where the insurance company paid the amount of the loss to the mortgagee, the company would be subrogated to all the rights of the mortgagee in the mortgage. In other words, the company then became the mortgagee, and as such was entitled to foreclose the mortgage when overdue for its own benefit. The court said:

"At a former hearing touching the sufficiency of a plea which had been filed by complainant to the cross-bill of defendant, I held as follows: 'It is settled in this State that a mortgagee of real estate has an insurable interest therein, and when such mortgagee, at his own expense and solely in his own behalf, procures insurance on the mortgaged property for the better security of his debt, the insurer, if obliged to pay a loss occasioned by injury to such property, may be subrogated pro tanto to the rights of the mortgagee under the mortgage."

This is in accord with the principles underlying the doctrine of subrogation hitherto discussed and is the well-settled law.

A further point is also to be noted in this case. Although it is only dictum, it may be taken as correctly representing the law. Where the mortgage empowers the mortgagee to take out insurance for the protection of the mortgagor's interest as well as that of the mortgagee and to charge the expense thereof to the mortgagor and the mortgagee does so take out insurance, in such case the mortgagor is entitled to have the amount of the insurance received by the mortgagee credited on his indebtedness thereby, of course reducing the mortgage by the amount of the insurance money. The court said:

"It may be said to be equally well settled that if the insurance has been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor will have the right, in case of a loss, to have the avails of the policy applied for his benefit toward the discharge of his indebtedness."

In such case, of course, there can be no subrogation, since if it were allowed the mortgagee would be the loser.

See Decision No. 1430.

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Insurance: Concealment: Construction of Policy: "Unconditional and Sole Ownership."

It has often been held by the courts that the contract of insurance as between the insured and the insurer is one of *uberrimæ fidei* — the highest good faith. With even more strictness than in the case of other contracts the courts will hold the policy void if there has been the slightest suppression of a material fact by the assured or any evidence, howsoever slight, of a lack of good faith on the part of the assured. The reason given for this rule is that the insurer is more or less at the mercy of the insured, who is in a position to know all of the facts about the subject-matter of the insurance while the insurer is not.

So strictly has this rule been applied in the case of marine insurance that the policy is void if the insured has concealed any material fact whatsoever, and it makes no difference whether the insured ever knew of the existence of the fact or not. Neither does it make any difference how much good faith was displayed by the insured. If the fact existed, and was not disclosed at the time of the taking out of the policy, the policy was void. It even seems that this would be true if the fact were one which the insured not only did not know, but could not by any means have learned.

In fire insurance, however, the rule is not quite so strict. In this particular branch the intent or knowledge of the insured is immaterial only when a question is asked by the insurer in reference to the moot fact. If such a question be asked the rule in fire insurance is the same as in marine — nothing whatsoever will excuse the non-disclosure of the fact about which the question is asked. When no question is asked, however, there must be in fire insurance an intentional concealment of a material fact. In other words, the insured must have known of a fact which would affect the risk and purposely refrained from disclosing it. So the law is laid down in Connecticut Fire Insurance Co. v. Colorado Leasing, Mining & Milling Co., Decision No. 1431, where the court says:

"The defendant claims that inasmuch as these matters, which it says were concealed, were material, the court should have instructed for it. The defendant loses sight of a very important fact in this case, and that is that no inquiry was made of the plaintiff about the matters alleged to have been concealed, and that no written application was made for this insurance. 'Concealment is the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate.' Clark v. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721.

"So that a concealment involves, not only the materiality of the fact withheld and which ought to have been communicated, but also

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the design and intention of the insured in withholding it, and, of course, the condition in the policy must be construed in the light of this definition of a concealment with which it is concerned. If an inquiry is made about a material fact and that fact is not disclosed upon such inquiry, it is very likely that the person questioned intended to withhold it; but if no inquiry is made, the intention to withhold the fact is not so plain. Hence the authorities make a distinction between cases where inquiry is made and cases in which no inquiry is made. The rule is stated in Wood on Insurance, 388: 'When no inquiries are made, the intention of the assured becomes material, and, to avoid the policy, they must find, not only that the matter was material, but also that it was intentionally fraudulently concealed.'"

Once the contract is validly made, however, the courts change their attitude, and any questions as to the construction or interpretation of the policy are decided, if possible, in favor of the insured and against the insurer. Such has long been the rule of construction of insurance policies, and so it is laid down once more in Decision No. 1431. The court said:

"This court and many others have stated that in case of doubtful meaning a policy should be construed in favor of the insured.

"Forfeitures are not favored, and courts do not declare one by implication.

"The policy does not expressly provide that the loss shall not be payable unless the statement is furnished within sixty days, but it does provide that the loss shall not become payable until sixty days after the statement or proofs of loss are received. In view of all the foregoing considerations, it must be held, in accordance with what seems to be the rule under the weight of recent authority, that the failure to furnish the statement within sixty days merely postpones the time of payment to the specified time after it was furnished and does not defeat recovery; the action having been commenced after sixty days after the statement was furnished and within twelve months after the fire."

An example of the application of this rule is to be found in this case. The assured warranted that it was the unconditional and sole owner of the premises. As a matter of fact it was merely in possession under a contract to buy, and had not paid all the purchase price, although it was not in default. Furthermore, a tax certificate for unpaid taxes had been issued against the property. The court held, nevertheless, that the warranty of unconditional and sole ownership was not broken, saying:

"Besides, as will be seen hereafter, there are many cases holding that a vendee in possession under such a contract of purchase is the unconditional and sole owner, notwithstanding that the purchase money has not been paid in full. The tax sale had not changed the interest of the owner. The certificate was, at most, a lien. The tax was a lien before the sale and before it became delinquent. The

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sale merely changed the form of the lien and transferred it from the State, county, and municipality, or whoever held the lien, to the holder of the certificate. It might as well be said that if an owner takes out a policy with such a condition before he pays his taxes, whether delinquent or not, it will be void upon loss, because the property was incumbered with the lien of the taxes at the time the insurance was effected.

"At the time the policy was issued, the plaintiff was the holder of the contract of purchase, in possession, using and improving the property and exercising all acts of full ownership. It had paid one-half or $5,000 of the purchase price. It was absolutely bound to pay the balance when due, though the mill burned down before that time. It was not in default. True, it did not have the legal title.

"Its title was an equitable one, but it was an equitable title that contemplated and embraced full ownership. The estate owned may be in fee simple, though the title by which it is held be an equitable one. The plaintiff was the owner in fee simple by an equitable title. The vendor held the legal title in trust for the plaintiff. The plaintiff being in possession, the vendor could not convey this legal title to another, free from the trust impressed upon it."

See Decision No. 1431.

Principal and Agent: Ratification of Unauthorized Acts of Agent.

An agent it is true is only justified by acting strictly within the scope of the authority conferred upon him by his principal, and beyond that scope he cannot bind his employer. In two ways, however, the employer may be bound when the agent has done an act actually beyond the powers conferred upon him — where the principal has clothed the agent with powers or knowingly allowed him to act as if he had powers which would justify a person dealing with the agent in believing that he possessed powers beyond the scope of those actually conferred, the principal will be bound by any act within the scope of such apparent authority even though it be beyond the scope of the actual authority of the agent. Of this hereafter. The principal may also after the performance of an act beyond either the actual or apparent authority of the agent ratify such act and thus bind himself by it just as though it were authorized from the start.

Such was the principle of law involved in the case of Garlick v. Morley, Decision No. 1432, where it was said:

"One may make another his agent by ratifying such other's assumption in the matter, and thereby become liable both to such other and to the third party with whom he deals, as well as by an original contract of employment. Such ratification may occur as well when a person without authority in fact from the principal assumes to have it, under another falsely pretending to represent the principal and to

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employ a subagent, as where there is no intermediary in the matter. True, there can be no ratification within the meaning of these rules without action on the part of the principal based on knowledge of the facts; but the ratification may appear circumstantially as well as expressly. It may be presumed by conduct such as by carrying out the contract and accepting the benefits in like manner as if the person assuming to be authorized to represent him had authority in fact, he at the time of such apparent approval having knowledge of all the essential facts, and particularly the assumption of agency. These principles are very familiar. It is not understood there is any controversy in respect thereto between counsel."

It will be noted that the ratification to be binding must be made with knowledge. If the principal does not know all of the facts in the case he cannot be bound by any alleged ratification. Suppose A authorizes B to buy a watch for him for $200. B in one transaction buys a watch for $250 and a chain or $50. He tells A of the purchase of the chain, and A assents thereto, but makes no mention as to the excess in the price of the watch. A's partial ratification does not bind him because made without knowledge of all of the facts, and he may, if he desire, repudiate the whole transaction. Indeed, he must either repudiate or ratify the whole transaction. It is the law that a principal cannot ratify in part and disaffirm in part. Whichever he does it must be all or nothing.

The effect of the ratification, as has been intimated, is retroactive. After ratification the parties stand in exactly the same position as if there had been original authority for the act, and a ratification once duly made cannot thereafter be revoked.

See Decision No. 1432.

Principal and Agent: Apparent Scope of Agent's Authority.

In the preceding note we stated that a principal would be bound by the act of his agent though in fact unauthorized if it were within the apparent authority of the agent. If a principal sends forth an agent to do certain acts, and if in that particular line of business an agent doing such acts has authority as a general thing to do certain other acts, the principal cannot relieve himself from liability if the agent should perform these last acts, by merely prohibiting his performance of them. Such acts are held to be within the apparent authority of the agent, and the principal can relieve himself of liability for them only by communicating to those dealing with such agent the limitation which he has imposed on the usual scope of authority. On the other hand, if the agent be a special agent, to whose employment there

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is generally attached no particular authority, the principal will not be bound by any of his acts in excess of his actual authority. In this class of cases those dealing with the agent are bound to inquire and ascertain the actual extent of his authority, and if they fail to do so, they deal at their peril.

The principle by virtue of which a principal is bound by the unauthorized acts of his agent is founded on the ground of estoppel. The law rightly holds that where one holds out another as his agent under conditions which justify one dealing with such agent in supposing that the agent has certain authority, he will be estopped from denying such authority. The contrary rule would injure those acting on the tacit representation of the principal in sending forth his agent. As was said in T. G. Bush Grocery Co. v. Conely, Decision No. 1433:

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086. Whether or not an act is within the scope of an agent's apparent authority is to be determined, under the foregoing rule, as a question of fact, from all the circumstances of the transaction and the business. Where one of two innocent persons must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. People's Bank of Belleville v. Manufacturers' National Bank of Chicago, 11 Otto 181, 25 L. Ed. 907; American Process Co. v. Florida White Press Brick Co., 56 Fla. 116, 121, 47 So. 942.

"If one holds another out to the world and accredits him as his agent, he is bound by that person's acts done within the scope of the agency thus given to him. In such cases the question is, not what authority was intended to be given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in believing was given to him. Griggs v. Selden, 58 Vt. 561, 5 Atl. 504; 1 Am. Lead. Cas. 568, note; Story's Agency, § 127, and note 2."

See Decision No. 1433.

Principal and Agent: Ratification.

Fisher v. Lutz, Decision No. 1434, draws attention to a qualification of what has been said in the two preceding notes. We have there seen that under certain circumstances a principal may ratify the unauthorized acts of his agent. In both of the cases so far considered, however, there was in fact an agency, and the agent merely exceeded his authority. A different turn is given to the matter, however,

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where there was no agency whatsoever, but a mere officious acting of one person for another with no previous authority. Even in such a case the one for whom the self-appointed agent acted may ratify the contract if the agent purported to act as an agent. But if there was no representation of agency at the time of dealing, and no authority to act as agent at all, the act cannot be ratified. So it was held in Fisher v. Lutz, where the court said:

"The boy, Arthur, not having acted or assumed to act as the agent of his father in the transaction, and having no authority so to do, it is difficult to see how there is any question of ratification in the case. 'In order that an unauthorized act may be capable of ratification it is necessary that it should have been performed by one acting as an agent on behalf of another as principal.' 31 Cyc. 1251, and cases cited. If we had the case of an agent acting in excess of his authority, but nevertheless assuming to act as agent, a promise to pay by the principal might well amount to a ratification. But we have no such case."

A few examples may make these distinctions clearer: (1) A employs B as his agent with certain instructions. B acts as agent and exceeds his authority. A may ratify. (2) A employs B as his agent with certain instructions. B contracts with C without disclosing his agency. In his case also A may ratify, whether B exceeded his authority or not. In the event of such ratification, however, C may hold either A or B personally. (3) A has not employed B as his agent, but B contracts with C purporting to be the agent of A. Here once more A may ratify. (4) A has not employed B as his agent. B contracts with C, not holding himself out as A's agent, but intending to act as such. In this case, as we have seen, A cannot ratify. In short, there can be no ratification in the eyes of the law of any unauthorized act of an agent unless there has been either some actual employment as agent or a performance of the act by one purporting to act as agent when in fact he is not one.

See Decision No. 1434.

Quasi-Contracts: Work and Labor.

The general rule is that one who has entered upon the performance of an express contract is bound by the terms thereof, and his rights and liabilities must be determined thereby. Certain modifications of this rule have been allowed by the courts. One is that where a party has completely performed his part of an express contract and nothing remains to be done but payment to him for his work, he may sue on the quasi-contract or the common counts, and need not declare on

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his special contract. This exception only goes to the remedy and not to the substantial rights of the parties. It is technical and of no interest to the layman.

Another exception, however, is of considerable importance. Suppose a party enters into a written contract to build a house for another at a given price to be paid on completion of the house. Before completion and payment the owner unjustifiably prevents completion and a performance of the contract. If the general rule stated at the beginning of this note were enforced the builder might find himself in a difficult position. He could not collect for his work except by suing on his contract. He could not sue on his contract, since, as required by another rule of law, he could not show performance of the contract on his part. In this dilemma the law allows him to sue in disregard of his contract. He can sue on the quasi-contract for the reasonable value of the work already performed and the materials furnished by him. The original contract in such an action drops out of the case as the foundation of the cause of action, though it may still be used as evidence of what is the reasonable value of the services rendered. So it was held in Elliott v. Wilson, Decision No. 1435, where the court said:

"The contract between the parties, in evidence, can be of no assistance to you in coming to a determination upon the issue of fact in this case, under the pleadings and evidence. The plaintiff's demand is based upon the value of the work and labor to the defendant, alleged to have been performed by them and their workmen, from the time the work on the building was commenced to the time they ceased to work thereon, as well as upon the value of the use of the machine to the defendant, alleged to have been retained and used by him in making the necessary additional blocks for the completion of the building after the plaintiffs had ceased to work thereon.

The various items and character of the plaintiffs' demand is disclosed by the restatement of their bill of particulars, which we have read to you.

"You need not consider the cost of the cement used in making the building blocks and lintels, either before or after the plaintiffs left off working on the building, for it is admitted by them that the defendant paid for the same; nor need you consider whether the plaintiffs mixed and made the blocks and lintels according to the specifications, annexed to the contract between the parties, for it is admitted by the defendant that he used them in the erection of the building. He also admitted that he used the block machine ten days according to the claim of the plaintiffs in the restatement of their demand.

"The vital questions for your determination, to be ascertained by you from the evidence, are: (1) What were the services rendered by the plaintiffs, and the use of the machine by the dfendant, reasonably worth to the defendant? (2) Has the defendant fully paid the plaintiffs for the services rendered and for the use of the machine?"

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Under the modern practice maintaining in most States, in such suit could also be joined a claim for the damages suffered, i. e., the loss of prospective profits.

See Decision No. 1435.

Quasi-Contracts: Mistake of Fact.

We have heretofore considered the right of one who has paid money because of a mistake of fact to recover such payment. Though against the strict logic of the law, this principle on the grounds of natural justice and equity has become firmly rooted in our jurisprudence. As before noted by us, there are, however, several limitations on this right, and some of these are considered in an exhaustive opinion in the late case of Ball v. Shepard, Decision No. 1436. In the first place, the mistake must arise in the same transaction as the payment of the money. This has been stated in various forms. That the mistake must be of a material fact, that the mistake must have been the inducing cause of the payment, and that the mistake must not be as to a collateral matter, are all varying expressions of the same underlying idea. Again it is held that the one receiving the money thus paid by mistake must not have changed his position thereby. If he has not changed his position, he is not injured by forcing a refund, but if he has changed his position, he would be injured. Now the right of recovery on the ground of mistake of fact, as we have said, is based on the theory of natural justice, and this is furthered when the parties are restored to the *statu quo*. It is not furthered, however, by transferring the loss from one innocent party to another equally innocent. This limitation only maintains when the one receiving the money has acted in good faith. If he has not, it may be recovered whether he has changed his position or not, not on the ground of mistake, but on the ground of fraud. Lastly, when the payment is made both parties must be laboring under the same mistake. A mistake on one side is not sufficient. The mistake must be mutual, not unilateral. In Ball v. Shepard the court exhaustively and thoroughly considers these various limitations on the right to recover money paid under mistake of fact, and we cannot do better than to quote somewhat at length from the opinion:

"This claim is predicated upon the principle that a party who pays money under a mistake of fact, to one who is not entitled thereto, must in equity and good conscience be permitted to get it back. That is a well-recognized principle of law; but we think it has no application to the case at bar. The simplest statement of the rule invoked by the plaintiffs is that, if A pays money to B upon the erroneous

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assumption of the former that he is indebted to the latter, an action may be maintained for its recovery. The reason for the rule is obvious. Since A was mistaken in the assumption that he was indebted to B, the latter is not entitled to retain the money acquired by the mistake of the former, even though the mistake is the result of negligence. That is the general rule laid down in Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Union Nat. Bank of Troy v. Sixth Nat. Bank of New York, 43 N. Y. 452, 3 Am. Rep. 719; National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232; Lawrence v. American Nat. Bank, 54 N. Y. 432; and Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161, which are relied upon by the plaintiffs. The difference between the case at bar and those relied upon by the plaintiffs is concretely illustrated in Lawrence v. American Nat. Bank, supra. There the plaintiffs, being indebted to P. on account, made out a statement of the account and paid to the defendant, the assignee of P., the amount which appeared to be due. It transpired that the plaintiffs had made a mistake in omitting to charge the defendant with $5,000 which they had loaned to P. and for which they were entitled to credit. Here it will be well to note that the reason of the rule which was applied in the Lawrence case must, of necessity, carry with it at least two limitations.

"One is that the mistake which is relied upon as the basis of recovery must arise in the transaction between the parties to the action; and the other is that even in such a case there can be no recovery if by reason of the payment the party receiving it has so changed his position to his prejudice that it would be unjust to require him to refund. Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n, 55 N. Y. 211, 213, 14 Am. Rep. 232, and Hathaway v. County of Delaware, 185 N. Y. 368, 370, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909. If circumstances do exist taking such a case out of the general rule permitting a recovery, the burden of proving them rests upon the party resisting the repayment. Mayer v. Mayor, etc., of N. Y., 63 N. Y. 455.

"From what has been said, it is evident that the rule which we have been discussing must have its antithesis, and we find it in that class of cases in which money is paid by one party, who labors under a mistake of fact, to another party who does not share in the mistake, and who receives the money in good faith in the regular course of business and for a valuable consideration. Justh v. Nat. Bank of Commonwealth, 56 N. Y. 478; Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511; Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Hatch v. Fourth National Bank, 147 N. Y. 184, 41 N. E. 403; Goshen Nat. Bank v. State of New York, 141 N. Y. 379, 36 N. E. 316. That rule has been tersely and correctly stated by Judge Gray in Nassau Bank v. Nat. Bank of Newburgh, 159 N. Y. 456, 459, 54 N. E. 66, 67, as follows: 'When money has been received by a person in good faith, in the usual course of business and for a valuable consideration, it cannot be pursued into his hands by one from whom it has been obtained through the fraud of a third person.' And the reason for this latter rule has been well stated by Judge Andrews in Stephens v. Bd. of Education, supra, where he said: 'It

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is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of the money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration.' 79 N. Y. 187 (35 Am. Rep. 511.) Perhaps the simplest illustration of this principle is to be found in Justh v. Nat. Bank of Commonwealth, supra, where the plaintiffs' certified checks which had been obtained by fraud, were deposited with the defendant bank by the person committing the fraud, in the ordinary course of business, and were paid by the bank on presentation. In that case the court suggested that the plaintiffs were cheated, not by the defendant, but by the fraud of the parties to whom they gave their certified checks, and that the loss occasioned by that fraud could not be transferred to the defendant bank, which was an entirely innocent party. The checks there used were referred to by the court as money which came into the hands of the defendant 'in the regular course of business, in a form as current as if it had been bank notes or United States currency,' and the court concluded that, if in such a case, it could be followed because the party who paid it procured it fraudulently, 'the transaction of business must stop, for no inquiry and no precaution could guard the receiver from responsibility.' In the nature of things there are exceptions to this rule, as, for instance, in a case where an agent is intrusted with property which is disposed of by him in fraud of his principal, and where the property or its proceeds may be followed as far as either can be traced (Van Alen v. Am. Nat. Bank, 52 N. Y. 1, 8), but these are not germane to the present discussion, and they are mentioned only to obviate the possible misapprehension that we regard the rule by which the case at bar is controlled as one subject to no exception.

Thus it will be seen that the two classes of cases above referred to are divided by a line which is very narrow and yet well defined. In the first class, relied upon by the plaintiffs, the mistake of fact is usually one which arises inter partes, and, in order to justify a recovery in any such case, it must appear that the defendant was not, in the first instance, entitled to receive the money, and that his circumstances have not been so changed through its receipt as to render it unjust to compel him to refund. In the second class the mistake of the payor is usually superinduced by the fraud of a third person and the payee is not only ignorant of the fraud or mistake, but receives the money in good faith in the regular course of business and for a valuable consideration."

See Decision No. 1436.

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Restraint of Trade.

In a former issue we discussed the law in relation to contracts in restraint of trade. In tracing the evolution of this department of the law we saw that at first all contracts which in any way restrained trade were void and illegal, but that in successive stages this was gradually changed until most jurisdictions arrived at the conclusion that a restraint of trade which was reasonable considering all the circumstances of the case would be upheld while one that was not would still be void. This is to-day generally the law independent of statute. It was thought at the time of writing the previous discussions that the Sherman Anti-trust Law had changed, in so far as interstate commerce was concerned, the modern rule, and had brought conditions back to the old days when all restraints of trade whether reasonable or unreasonable were forbidden. However, in the much discussed case of Standard Oil Co. v. U. S., 31 Sup. Ct. Rep. 502, the United States Supreme Court has finally decided that the Sherman Anti-trust Law forbids only unreasonable restraint of trade, and is, therefore, merely declaratory of the common law as laid down in the modern decisions.

In Kentucky, at least, and probably also in Michigan, Louisiana, Iowa and Alabama, a further restriction is placed on contracts in restraint of trade, i. e., they must be ancillary. This means that a contract is void even to-day whose primary object is to restrain trade, and the reasonableness of the restraint will not be inquired into. In order to be upheld, a contract which results in the restraint of trade must be made merely as ancillary to some other contract or transaction, and must furthermore be reasonable. For example — A and B are manufacturers in the same line of business. They agree to maintain a certain schedule of prices and to sell to no one who does not agree to abide by the schedule. Here the primary object of the contract is to restrain trade, and, under the rule we are considering, it would be void. Suppose, however, that A and B are engaged in the same business, A in the town of X and B in the town of Y. B sells his business with its good will, etc., to A and agrees not to carry on the same line of business either in the town of X or the town of Y for ten years. Here the restraint of trade is merely a secondary object and is made merely for A's legitimate protection. If under all the circumstances of the case such restraint is reasonable it will be upheld. So it was held in Barrone v. Moseley Bros., Decision No. 1437, where the court said:

"That there may be a reasonable restraint of trade is no longer an open question. Sutton v. Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. Law Rep. 453, 9 Am. St. Rep. 274; Louisville Board of Fire Underwriters

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v. Johnson, 133 Ky. 197, 119 S. W. 153, 24 L. R. A. (N. S.) 153. And, in applying the rule, appellants concede that covenants in partial restraint of trade are now generally upheld as valid, when made by the seller of a business not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner not to compete with the firm; by a partner not to do anything to hinder the business of the partnership; by an assistant or agent not to compete with his master or employer after the expiration of his term of service; by the buyer of property not to use it in competition with the business retained by the seller; or by a lessor of property not to be used in competition with the business of the lessee. It is, however, a very general rule that any contract of this character must be an incident to and in support of another contract or sale, in which the covenantee has an interest which is in need of protection.

"As was said by this court in Clemons v. Meadows, 123 Ky. 181, 94 S. W. 14, 29 Ky. Law Rep. 620 (6 L. R. A. [N. S.] 847, 124 Am. St. Rep. 339): 'Such contracts are intended to secure to the purchaser the good will of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint to be valid must [not] be more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business which he has purchased. In this class of cases, the court recognizes that the vendor has received an equivalent for his agreement to partially abstain from business at the place where his business was formerly conducted. In such cases the agreement does not contemplate that the business or trade purchased shall be discontinued, and thus perhaps throw out of employment those whose services were necessary to carry on the business; but, on the contrary, it is contemplated that the business will be carried on, and that the public will continue to receive benefits which may accrue from the conduct of the business. It results that the agreement does not have the effect of depriving the public of any benefits which it has enjoyed from the conduct of the business, or pursuit of the trade which has been transferred to another. Such contracts do not have the effect of destroying the competition which existed, by reason of which the public enjoyed benefits.'"

See Decision No. 1437.

Sales: Failure of Consideration.

We have seen that generally where rescission of a contract is sought the court will force a restitution of all benefits received under the contract before allowing rescission. This is the rule where a contract is sought to be rescinded on the ground of fraud, or of mistake, or where an agent has exceeded his authority. In almost every other case the rule is the same. There are, however, two qualifications of the rule. Where one without his fault has put himself in a position where he cannot restore, restoration will not be insisted upon. In like manner

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where restitution will be of no use it will not be enforced. So where the article received under a contract is of no value it need not be returned. It is on this ground that the case of Toole v. Daniel, Decision No. 1438, goes. It is there held that where a contract is sought to be rescinded on the ground of failure of consideration — a valid ground of rescission — restitution is unnecessary. The court says in part:

"The defendant had pleaded total failure of consideration, and this, of course, includes the defense of partial failure. The evidence failed to establish the plea in toto (for the machine for which the note was given was, notwithstanding its alleged deficiencies, plainly of some value), but it was shown that there had been a partial failure. In one portion of the charge the court instructed the jury that 'where a party sets up, as a defense to an unconditional contract in writing, that the consideration totally fails, it is incumbent on the defendant, the moment he discovers the defects, to restore the plaintiff to his former status in a reasonable time.' This, of course, was erroneous. The duty of restoring the status applies where the defendant sets up rescission for fraud or breach of warranty, and not where the defense is based on failure of consideration."

Before accepting this statement *in toto*, however, a distinction must be noted. Where there is a total failure of consideration there is, of course, no need to restore, as whatever has been received under the contract either is not in existence or has no value. In the case of partial failure, however, the case is different. Generally a partial failure of consideration is not ground for rescission, but merely for a suit for damages. In case, however, the partial failure is a ground for rescission — and whenever this is the case it is because of the doctrine of constructive total failure — restitution must be made before rescission is allowed. With this distinction in mind the above quotation may be taken as correctly representing the law.

See Decision No. 1438.

Telegraphs and Telephones.

In the past we have frequently adverted to that branch of the law which deals with public service companies, sometimes called the law of carriers. We have seen that such companies are subject to control and regulation by the State while the everyday private business is not subject to such control and regulation so long as it keeps within the penal law. There are two aspects of the question which are sometimes confused, and they are the relations of the company with the public and the relations of the company with the individual. The confusion arises from a failure to distinguish between those peculiar

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rules which apply to a carrier as such and those which apply to it as engaged in a public service. This failure to distinguish has its origin in the careless nomenclature of many writers on the law who were in the habit of using "carriers" and "public service companies" as interchangeable terms.

We find this confusion illustrated in the law of telephones and telegraphs. Many writers and some courts find it difficult to reconcile the fact that while a telephone or telegraph company is subject to State control and regulation, it is not subject to the extraordinary liability of a common carrier. The reconciliation is simple if we bear in mind that a telephone or telegraph company is a public service company, but is not a common carrier.

In its function as a public service company it is subject to State control; it must serve all, and it must serve for reasonable rates. In its ordinary functions it is merely liable under the general rules of law. Hence it is liable for negligence only, always remembering that negligence depends on the facts and circumstances of each particular case. So it is held in Western Union Telegraph Co. v. Bickerstaff, Decision No. 1439, where the court says:

"When a telegraph company receives a message for transmission, it then becomes it duty to send it promptly, where the message on its face shows the necessity for prompt action. But the telegraph company does not insure the prompt transmission of any message. The extent of the obligation which it assumes, and the duty imposed upon it, is only to exercise ordinary care and diligence, and it is only liable for a failure to transmit as promptly as is reasonably practicable under all the existing circumstances. It is not responsible for delays due to causes over which it has no control, and against which it could not guard by the exercise of ordinary care, foresight, and diligence. But it will not be excused when the cause of the delay was due to its own negligence. This negligence may arise either where the trouble was caused originally by it, or where it could have been repaired in due time by the exercise of ordinary diligence. In other words, the law imposes upon the telegraph company the duty to exercise ordinary care and diligence, both in preventing any wire trouble and in repairing same promptly after it occurs. Where the telegraph company relies upon some trouble with its wires as an excuse for not promptly transmitting a message, it devolves upon the company to show that it was not due to any fault of its own."

It is to be noted that if the company knows of any reason why it cannot forward the message with expedition, it is bound to make such reason known to the sender. Otherwise it will be liable. So the case we are discussing holds, saying:

"It was the duty of appellant's operator, when he received the message for immediate transmission, to have informed Dr. Rightor that it could not be sent promptly because of the wire trouble. By giving

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him this information it would have afforded him an opportunity to have sent the message by other means. A telegraph company cannot rely upon the defense that it could not transmit a message on account of trouble with its wires, even though caused through no fault of its own, if the existence of the trouble was known to it when it accepted the message, and it failed to inform the sender of its inability to transmit it promptly on that account. In the case of Western Union Tel. Co. v. Harris, 91 Ark. 602, 121 S. W. 1051, 24 L. R. A. (N. S.) 1283, this court approved the following rule in regard to this question: 'If a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means." In failing, therefore, to inform Dr. Rightor at the time the message was received by it for transmission that it could not be promptly sent because the wires were down, the appellant was guilty of negligence rendering it liable for the damages caused thereby."

See Decision No. 1439.

Warehousemen: Warehouse Receipts: Pledges.

A pledge is the giving to one man of the right to possession while another has the right of ownership. It is generally conditioned upon the performance of some act by the ultimate owner by which he will once more obtain possession as well as ownership. Possession, therefore, is the essential requirement of a pledge. Without possession on the part of the pledgee there can be no pledge any more than there can be a sale without a change of title. So it is held in In re Rohrer, Decision No. 1440, where the court says:

"Possession must accompany the pledge of personal property; the pledgee having a qualified ownership for the purposes of the pledge. There may be a symbolical or constructive delivery of possession to a pledgee, but that delivery must be as effectual against the general owner as the delivery of the property it represents. The property itself passes either actually or constructively out of any dominion or control of the owner, otherwise there is no pledge."

This change of possession which is necessary to constitute a pledge may, however, be symbolical as well as actual. Hence delivery of a bill of lading of certain goods may be as effectual as an actual delivery of the goods themselves. This we have hitherto considered. The law in this country, though probably not in England, is the same in reference to warehouse receipts. On this point In re Rohrer says:

"Warehouse receipts symbolically pass possession from the general to the qualified owner, the pledgee, because the possession of the actual property has so far passed out of the hands of the general

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owner that acts of dominion exercised by him are no longer possible. When the pledgees took these receipts, they knew that the owner could satisfy such control as the government had jointly with him by paying the tax. They knew that such control as the government had might be raised at any moment, and that the owner would then be under no restraint whatever, and could roll the barrels out of the warehouse without let or hindrance from anybody. This would not be possible when goods are in a warehouse in the ordinary sense."

From this it follows that an owner who warehouses his goods and then pledges the warehouse receipts therefor cannot thereafter obtain his goods. So it was held in the case we are considering in these words:

"A warehouseman is a third person who for business and for hire keeps and stores the goods of another. Black, Law Dict. He is a person who receives goods and merchandise to be stored in his warehouse for hire. Bouvier's Law Dict. and other authorities cited in Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; Bucher v. Commonwealth, 103 Pa. 528; Bank v. Shearer, 225 Pa. 470, 74 Atl. 351; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24. The owner stores his goods there and parts with possession. By contract with him the warehouseman has actual possession and the owner symbolical possession. The owner passes his symbolical possession on by pledge of the receipt. This is good because the owner has no dominion over the goods themselves, and the pledgee succeeds to his right to get the actual goods by presenting the receipt to the warehouseman who will not, without it, part with them. The owner after pledging the receipt cannot himself get the goods. A delivery of actual possession prevents fraud of the pledgor. The delivery of the symbol should be no less effective. If he warehouses his own goods and issued receipts against them, the door is open for the grossest frauds; this case being an example."

See Decision No. 1440.

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NOTES OF RECENT CASES.

Accord and Satisfaction.

OGILVIE v. LEE, 138 S. W. (Mo.) 926, lays down that the acceptance of a lesser sum in payment of a debt for a larger amount constitutes an accord and satisfaction only when there is some dispute as to the amount due.

Bankruptcy: Preferences.

It is laid down in KIMMERLE v. FARR, 189 Fed. 296, that in order to constitute a voidable preference under the Bankruptcy Act it must be shown that it was made (1) while the debtor was insolvent, (2) within four months of the bankruptcy, (3) so that the favored creditor actually receives an advantage over other creditors of the same class, (4) with intent on the part of the bankrupt to prefer the creditor and (5) with knowledge or reasonable cause to believe on the part of the creditor that a preference was intended. This is in accord with well-established rules heretofore considered by us.

Banks and Banking: Payment of Checks:

CATHERS v. NATIONAL BANK OF COMMERCE, 117 Pac. (Kan.) 1016, assumes that in order to hold a bank responsible to its depositors for the payment of a check procured by fraud it is necessary to show that the bank had knowledge in reference to the transaction which would put a reasonable man on inquiry. The facts in the case were held not to justify the imputation of such knowledge.

Bills and Notes: Bona Fide Purchaser: Presumption.

That the indorsee of a negotiable instrument valid on its face is presumed to be a bona fide holder in due course is reaffirmed in HALSTEAD v. WOODS, 95 N. E. (Ind.) 429.

Bills and Notes: Bona Fide Purchasers: Taking after Maturity.

In ROWE v. SCOTT, 132 N. W. (S. D.) 695, the decision is based on the elementary principle that one who takes a negotiable instrument after maturity is not a holder in due course and takes subject to any defenses which may exist in favor of prior parties thereto.

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Bills and Notes: Certificates of Deposits: What Law Governs.

That certificates of deposit may by their terms be negotiable, that the negotiability and validity of an instrument are determined by the law of the place where the instrument is executed, while the validity of an indorsement is determined by the law of the place where the indorsement is made, are well-established rules of law, and are reaffirmed in KRIEG v. PALMER NATIONAL BANK, 95 N. E. (Ind.) 613.

Bills and Notes: Value.

SAMSON v. WARD, 132 N. W. (Wis.) 629, holds that one who takes a negotiable instrument as collateral security for a pre-existing indebtedness takes for value, and is therefore a holder in due course.

Bills of Lading.

The transfer of a bill of lading to one who advances money on the strength thereof operates as a transfer of the legal and equitable title to the goods represented by the bill of lading. So it is held in W. T. WILSON GRAIN CO. v. CENTRAL NATIONAL BANK, 139 S. W. (Tex.) 996.

Carriers: Limitation of Liability for Negligence.

As we have often noted the federal courts hold that a carrier cannot contract away its liability for injuries resulting from its own negligence or that of its servants. GEORGE N. PIERCE CO. v. WELLS, FARGO CO., 189 Fed. 561, upholds such a stipulation, and would seem to be in conflict with the federal rule. One judge, it is to be noted, dissents.

Contracts: Construction.

That words in a contract should, whenever possible, be taken in their ordinary sense, and that ambiguities in a contract are to be construed against the party who drew the contract, are two rules for the construction of contracts reaffirmed in AMERICAN LITHOGRAPHIC CO v. COMMERCIAL CASUALTY INSURANCE CO., 80 Atl. (N. J.) 25.

Contracts: Construction.

ILLINOIS MATCH CO. v. CHICAGO, R. I. & P. RAILWAY CO., 95 N. E. (Ill.) 492, holds that where a contract is made up of more than one writing, all parts of all the writings must be considered together in order to get at the real intention of the parties.

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Insurance: Construction of Policies.

In case of doubt policies of insurance are to be construed strictly against the company. This is the universal rule, and is to be reaffirmed in MUTUAL LIFE INSURANCE CO. OF N. Y. v. DURDEN, 72 S. E. (Ga.) 295.

Principal and Agent: Notice to Agent.

GOODWIN v. COLUMBIA TELEPHONE CO., 138 S. W. (Mo.) 940, holds that notice to an agent is notice to the principal only when it is given to the agent while acting as agent and in the course of his employment. This applies to agents for corporations as well as for individuals.

Sales: Damages for Breach of Warranty.

Where an express warranty is broken the buyer may keep the goods and recover from the vendor his damages, i. e., the difference between what the goods actually are worth and what they would be worth if they were as warranted. So held in OBENCHAIN & BOYER v. INCORPORATED TOWN OF ROFF, 116 Pac. (Okla.) 782.

Sales: Price.

JULES LEVY & BROS. v. A. MAUTZ & CO., 117 Pac. (Cal.) 936, holds that where a contract of sale is otherwise complete, but contains no reference to the price to be paid, the law will imply an agreement to pay a reasonable price.

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Banks and Banking: National Banks: Depositors.

In Fidelity and Deposit Co. v. Colby, Decision No. 1444, the following peculiar state of facts, as stated by the court, gave rise to the controversy:

"In the year 1903 Johnson, who was then a bookkeeper in the Marine National Bank, was in the habit of receiving checks or money, belonging to the firm, from one of the defendants at his boarding place, usually in the evening, and some of the money he appropriated and some he delivered to the receiving teller of the bank, and credit was given for the money received by the bank and the amount of the several checks. The defendants drew checks from time to time against their account in the bank, which were paid by it. Johnson had these checks to charge against the account of the defendants, but instead of doing so charged them to the accounts of other depositors, and retained the checks. In the early part of September the books of the bank showed that the defendants had overdrawn their account to the amount of $18.98, of which they were advised.

"Johnson had manipulated several accounts in the bank, and his defalcations exceeded $5,000, including about $900 which he had stolen of the money given him by the defendants to deposit in the bank. An investigation disclosed these peculations, and he surrendered to the bank the checks of the defendants which he had charged to the accounts of other depositors, and they were, in November, 1903, charged to the account of the defendants, making an overdraft of nearly $900, which the defendants refused to pay. Johnson had furnished to the bank the surety bond of the plaintiff, and it paid to the bank the full amount of the shortage caused by Johnson, and obtained from the bank an assignment of its claim against the defendants by reason of the overdraft; and this action is to collect that sum."

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The plaintiff, as stated, was on the bond of Johnson and paid to the bank the amount of the loss caused by his defalcation. It thereupon took from the bank an assignment of the bank's claims against the defendants — although this was really unnecessary under the doctrine of subrogation as discussed by us in our last issue (page 66a January, 1912). The case, therefore, stood on the same footing as if the bank itself were suing the defendants on their overdrafts. From the facts stated it will be clear that whether the defendants were overdrawn or not depended on the legal question as to whether their deposits given to Johnson at his boarding house were, in view of the law, given to Johnson personally or given to him as agent of the bank and therefore given to the bank itself.

The court argued that the whole question depended on one of agency. If Johnson were the agent of the bank or if he acted within the scope of his apparent authority in receiving the deposits at his boarding house, then the bank was bound by such reception notwithstanding that through Johnson's subsequent misappropriations it never received the deposits so made.

There was no proof in the case that the bank ever knew of Johnson's habit of receiving deposits outside of the bank's place of business or ever authorized him so to receive them. There was, therefore, in the case nothing of actual authority and the whole question simmered down to Johnson's apparent authority. The court reasoned that since the National Banking Act, of whose provisions the defendants were charged with knowledge, provides that the usual business of a national bank "shall be transacted at an office or banking house located in the place specified in its organization certificate," and since the receipt of deposits was part of the "usual business" of the bank, Johnson could have no apparent authority to receive deposits except at the office of the bank. The defendants were therefore held liable, the court saying:

"The defendants claim that Johnson, in receiving their money, represented the bank, instead of acting in their behalf. I think the position is untenable. The inception of the account at the Commercial Bank was because of the desire of the defendants to accommodate and aid Johnson. When the account was running in the Marine National Bank, Johnson obtained a passbook for the defendants and generally returned it to one of them when money or checks were delivered for deposit, but Johnson did not then enter the credits in the passbook. The entries were made at the bank by Johnson, or by one of the tellers. When Johnson returned the passbook to the defendants, he had entered correctly all the credits to which the defendants were entitled, if everything had been properly delivered to the bank by him. The defendants must have known, from the course of business, that these entries were to be made at the bank, for Johnson brought the book each time from the bank with the entries made.

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"Money left at the bank by its depositors for deposit was delivered to the receiving teller. No part of this sum of $900, paid to Johnson by the defendants, was paid to the receiving teller, or came into the actual custody of the bank. There was no definite representation made by Johnson to the defendant that he was authorized to act as agent for the bank in receiving this money for it. The inference is rather to the contrary, for he was getting the money and checks primarily to help him in his standing with the bank. Nor is there any evidence that the Marine National Bank authorized him to receive these moneys as its agent. It was not within the compass of his duties to receive money even in the bank, much less from people on the street or at their homes. None of the officers of the bank knew anything about the course Johnson was pursuing, for the money stolen never came into its custody, and he never advised any of them that he was receiving money on behalf of the bank.

"Section 5190 of the National Bank Act (U. S. Comp. St. 1901, p. 3486) is as follows:

"'The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.'

"The authorities, so far as I have been able to find, support the proposition that where an employee of a bank receives money for deposit outside the bank, and it does not reach the bank, he is the agent of the person delivering him the money, and not of the bank."

See Decision No. 1444.

Banks and Banking: Insolvency: Assignments.

A peculiar decision, rendered without a particle of reasoning so far as the opinion of the court discloses, is to be found in the recent case of Borough Bank of Brooklyn v. Rosenweig, Decision No. 1445. One who was indebted to the bank on his note bought out the claim of another depositor and took an assignment thereof. The bank was insolvent. The court held that while the bank was thus insolvent the assignee could not set-off the amount of his purchased claim; but that if the bank subsequently became solvent and resumed business the set-off would then be allowed. The court said:

"What interest did the assignment carry to the assignee? It did not give him the right to have it applied on the note pending the receivership. But the plaintiff resumed business, and the deposit remained intact, and, subject to any just right of application to Jaret's indebtedness, became the property of the assignee, unless the parties to the assignment agreed to cancel it."

It will appear that the learned court gives no authority and no reason for such a distinction and indeed is not even very clear in stating the distinction. In our opinion there is absolutely nothing to be said in favor of this position of the court. It is now well settled in the law that if one owes a bank money on a note and at the same

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time the bank owes him money on a deposit, the depositor may in bankruptcy or insolvency proceedings set off the bank's indebtedness against his own. What difference there is in principle between a case where the bank's debtor derives his claim from a transaction directly with the bank and where he derives it from a third person, it is impossible for us to see. In either case the bank has a valid claim against him and he has a valid claim against the bank. In principle, under our modern view of law, it can make no difference whence either obtained their claims.

The court's allowing the set-off when the bank is solvent, while disallowing it when the bank is insolvent, cannot but cause surprise and astonishment. The allowance of such set-off is only important when the bank is insolvent. When the bank is solvent the right of set-off is of no practical importance. If A owes the bank $100 and the bank owes A $100 it makes no real difference to A whether he is allowed to set-off or not, provided the bank is solvent. If the bank sue A for $100, A can sue the bank for $100. They will both collect and be even. If, however, A be solvent but the bank be insolvent and set-off be not allowed, the bank could collect from A the full $100 and then pay A only a proportion of the $100 owed him as a dividend. It was to meet the injustice of this situation that the so-called "equitable set-off" was evolved as a settled principle of our law. In the case under discussion it seems that this principle was entirely overlooked.

See Decision No. 1445.

Banks and Banking: Checks: Fictitious Payee.

At this late date it would seem to be unnecessary for courts to decide or lawyers to question the liability of a bank who pays the amount of a check relying on the forged endorsement of the payee. In such case the bank is, of course, absolutely liable and negligence or due care does not have anything whatsoever to do with such liability. The bank is liable simply because it has broken its contract with its depositor to pay out his funds only on his written order. So it is held in Russell v. First National Bank of Hartselle, Decision No. 1446, where the court says:

"As a general rule, where a check is drawn, payable to the order of any actually existing person, if the order or indorsement of such payee is forged, payment by the bank on which it is drawn is not an acquaintance. The depositor has directed payment to be made in a certain manner; a payment made otherwise than according to his directions is no discharge of a bank's obligation towards him. A check or bill, payable to order, is authority to the banker only to pay it to the payee, or to a person who becomes the holder by a genuine indorsement. Morse on Banks and Banking, vol. 2 (3d ed.) § 474."

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What some courts hold to be an exception to this rule occurs when John Smith, an impostor, induces Jones to draw a check to his order representing himself to be Richard Brown, and then indorses the check "Richard Brown" and cashes it. In such case the bank paying the check is released from liability, providing, of course, that it did not know of the fraud or of Smith's identity. Properly speaking, this is not a case of a "forged indorsement" at all. The man who Jones intended should get the check actually got it and indorsed it although with a false name. The case would be different, however, if Smith had falsely and fraudulently represented himself to be the agent of Richard Brown and then, after Jones had given him a check to Brown's order, forged Brown's name thereon. This would properly constitute a forged indorsement and, under the general rule, the bank paying on such indorsement would be liable for the reason that Jones intended to give the check payable to Brown and Brown has not indorsed it. It makes no difference under the circumstances whether Brown is actually in existence or not. So it is held in the case we are discussing, where the court says:

"There appears in a community occasionally an impostor — a person assuming the name of some other person, for the purpose of imposition or fraud. In such cases the general rule seems to be that, where the imposter assumes to be, and by such assumption induces a drawer of a check to believe he is in fact, the person he claims to be, and is by the drawer of the check actually named as payee in the check, then the drawer of the check has no right to complain of the payment of the check by the bank upon which it is drawn, if it was actually indorsed by the impostor, and he received the money. But this rule does not apply ordinarily to a case where the impostor merely assumes to be the agent of the person named as the payee, and not the payee himself; for, while the drawer, by delivering the check to such a person, may be regarded as vouching for him as the agent of the payee, he does not vouch for his right to indorse payee's name. Judson Harmon, Receiver, v. Old Detroit National Bank, supra.

"In the present case, there was no one, so far as the evidence discloses, in Birmingham or elsewhere who personated Frank Framhold. The evidence does show that Claud Harris falsely represented himself to be the agent of Frank Framhold, and that he, in person, or by the aid of some confederate, forged Frank Framhold's signature on the back of the check. The fact that he, either in person or with the aid of a confederate, also forged the same name to a deed does not, it seems to us, throw any light upon this case, or in any way help appellee. No banker who handled the check ever saw the signature to the deed, and it cannot be said that the signature to the deed in any way caused the bankers, or any of them, to cash the check.

"We can see nothing in the facts of this case which takes it without the operation of the well-established rule that a banker on whom a check is drawn must ascertain, at his peril, the identity of the person named in it as payee; and we can see nothing from which a reasonable

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conclusion can be drawn that any bank connected with this transaction was misled by an act of negligence or other fault of appellant, justifying the mistake which was made in the payment of the check."

This decision brings the law of bills and notes on this point in exact accord with the law of contracts and of carriers. We discussed the law of carriers under this aspect in our last issue (page 58a January, 1912).

See Decision No. 1446.

Banks and Banking: Authority of Cashier: Negotiable Instruments Act.

A more or less unusual state of facts is presented in U. S. National Bank of Vale v. First Trust & Savings Bank of Brogan, Decision No. 1447. We can best present them by quoting from the case as reported:

"This action is based upon two inland bills of exchange for $120.47 and $160, respectively, upon which the plaintiff charges defendant as an acceptor; the first, with the alleged acceptance, being in the following form:

"'Brogan, Oregon, Nov. 22, 1910. No. ———. First Trust & Savings Bank: Pay to the order of U. S. National Bank ($120.47) one hundred & twenty 47/100 dollars. Morrison & Son. O. K. by Tschirgi, Cashier, 11/22/10.'

"The second bill is in the same form, except as to amount and name of payee.

"The complaint alleges the corporate existence of the plaintiff and defendant; the execution of the bills and the delivery thereof to plaintiff; the presentment of the bills to defendant and its due acceptance of the same in writing, upon the face thereof, as follows: 'O. K. Tschirgi, Cashier.' At said time, E. L. Tschirgi was cashier of the First Trust & Savings Bank, of Brogan, Or. Plaintiff, relying upon said bills and their acceptance by defendant, then and there paid to the drawer, Morrison & Son, the amount of the bills. November 29, 1910, plaintiff presented the bills to defendant for payment, which was refused.

"It appears from the evidence, which is all contained in the record, that Mr. J. P. Dunaway, at the time the transaction occurred, was the vice-president and acting cashier of the plaintiff bank, at Vale, Ore.; and Mr. E. L. Tschirgi was the cashier of the defendant bank at Brogan, Ore. At the date mentioned on the bills, W. J. Morrison, of the firm of Morrison & Son, gave the plaintiff the two bills in payment of a note, and for $160 in cash.

"Mr. J. P. Dunaway testified that he called Mr. Tschirgi up over the telephone, a few minutes after he had taken the bills or checks of Morrison & Son, and told him that Mr. Morrison had stated that he had arranged with Mr. Tschirgi to take care of his checks, and he wanted to know if he would do so if the checks were presented. Mr. Tschirgi answered 'that they would not'; that Mr. Morrison was looking for a remittance from Weiser, and, if the same were received,

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he would take care of the checks, but unless the money came he could not accept them.

"After Mr. Dunaway phoned to the commission company in regard to the remittance, and reported to Mr. Tschirgi that he was informed that the remittance had been mailed, and after Mr. Morrison talked over the phone to Mr. Tschirgi, Mr. Dunaway said to the latter, 'I'll mark the checks O. K. by you and send them to Boise for clearance,' and Mr. Tschirgi said 'All right,' and he so marked the checks. To the question, 'It was at that time that Mr. Tschirgi told you to sign his name on that check?' Mr. Dunaway answered: 'I didn't say that. I told him what I would do, and he said, "All right."' On cross-examination, to the question, 'You knew as a banker, after they (the checks) were certified, that the bank would be holden?' Mr. Dunaway answered: 'Yes, sir; then I knew it was customary, if the cashier said it would be paid, it would be paid.'"

It was held by the court that the cashier of a State bank could have no authority to authorize an officer of another bank to accept paper for it. This is probably true on the general principles of principal and agent, but it is unquestionably true in the law of bills and notes by reason of the express provision of the Negotiable Instruments Act which requires that the acceptance of a bill must be in writing and signed by the drawee. The court on this point said:

"At the most it appears to be a notation made by Mr. Dunaway, cashier of the Bank of Vale, indicating that Tschirgi, cashier of the Bank of Brogan, had approved the checks verbally over the telephone. Tschirgi, as such cashier, had no implied authority to authorize Mr. Dunaway to accept the checks for the Bank of Brogan, and there is no evidence in the record that the defendant bank, or any officer thereof, ever empowered Tschirgi to delegate such authority to Mr. Dunaway. Tschirgi, cashier of the Bank of Brogan, was its agent, and the general rule is that an agent in whom trust or confidence is reposed, or who is required to exercise judgment, may not intrust the performance of his duties to another. 31 Cyc. 1425; Dorchester & Milton Bank v. New England Bank, 1 Cush. (Mass.) 177; Emerson v. Providence Hat Manufacturing Company, 12 Mass. 237, 7 Am. Dec. 66.

"Mr. Dunaway, at the time of the alleged acceptance of the checks, was the vice-president and acting cashier of the Bank of Vale. One cannot be a party, and, in the same transaction, an agent of the opposite party, except with the full knowledge and consent of such principal. It was incompatible for the cashier of the plaintiff to act as agent of the defendant in accepting the checks in question. Mechem on Agency, §§ 66, 68. Neither is there any evidence in the record to the effect that the plaintiff ratified or adopted as its own the act of Mr. Dunaway in making the indorsement on the checks. Our Negotiable Instruments Law requires that the acceptance of a bill must be in writing and signed by the drawee. L. O. L., § 5965. There being no competent evidence tending to show that the defendant bank signed an acceptance of the checks, we think it was error for the trial court to admit the memorandum on the checks in evidence."

See Decision No. 1447.

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Banks and Banking: Notice: Deposit by Officer of Corporation of Corporation Check to His Individual Credit.

It is frequently stated that the deposit to his own personal account by an officer of a corporation of a check drawn by himself to himself renders the bank receiving the same liable to the corporation, especially if the receiving bank be also the drawee bank. While the practical result of the transaction described will often be as stated, the proposition thus laid down cannot be accepted as accurately presenting the law. The correct rule is that the transaction described puts the bank on inquiry and charges it with notice. Hence if the payment by the officer to himself was in fact authorized, *i. e.*, a payment of salary due him, the bank is absolved. So also will the bank be absolved even though the payment by the officer to himself be not authorized, if an inquiry by the bank would disclose no facts which would charge it with notice of the officer's lack of authority to pay himself the company's money. It even makes no difference whether the bank actually makes the inquiry or not. It is liable only for the facts which the inquiry would disclose. If these facts would justify its payment of the check it is free from liability. This is all that is meant when it is said that the bank is put on inquiry or charged with notice. This doctrine is clearly brought out in the case of Buckley v. Lincoln Trust Co., Decision No. 1448, where the court, after laying down the general rule charging the bank with notice and examining the authorities, says:

"While it is conceded in this case no inquiry was made by the defendant, nevertheless under the authorities (supra) it is entitled to the benefit of any facts which might have existed and which a proper investigation might have disclosed. This leads us to a consideration of the facts as they existed, and as disclosed by the evidence in the case.

"The defendant, if it had made investigation, would have ascertained that Munzer was the manager of the plaintiffs' business in New York city, with free power to engage and discharge employees, and that he had full management of the business of the plaintiffs; the defendant would have discovered a power of attorney, executed before the deposit of the check in question, authorizing Munzer, the manager, to open and keep an account in the German Exchange Bank for the use of the plaintiffs, to deposit checks, etc., and to withdraw the proceeds thereof, 'or any part or all of the proceeds,' to pledge the credit of the plaintiffs, 'and for these and all other purposes to sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts, and bills of exchange.' While it was true this power of attorney represented the act of the United Cloak & Suit Company, I find and hold from the evidence in this case that the parties and the interests of the plaintiffs and the United Cloak & Suit Company in this action are identical, and that for the purpose of this action they may be considered as the same person. Further investigation would

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have shown to defendant a letter addressed to the German Exchange Bank, dated June 10, 1910, from the plaintiffs, as follows:

"'We hereby authorize and appoint Henry Munzer manager, power of attorney to sign and indorse checks of the United Cloak & Suit Company and E. A. Buckley & Company, by a vote of the majority of directors present at this meeting.'

"Inquiry by the defendant would have elicited also the following important document in existence before the deposit of the check in suit:

"'At a meeting of the directors of this company, held on the 10th day of June, 1910, and on motion duly made and seconded, it was agreed that Henry Munzer, manager of the company, be empowered to bill certain bills and use certain checks of the company until he has reimbursed himself for certain moneys he has personally advanced for the company, the amount not to exceed two thousand dollars.'

"And still another of the same date allowing said manager the sum of $35 a week for entertaining the trade, to be retroactive from October 1, 1909, to June 10, 1910, and to continue thereafter without date mentioned. The last two papers are concededly signed by the secretary of the company, and his answer thereto is that he has no recollection of ever seeing them or signing them; that he does not know how his name ever appeared on the papers except that he put it there. The evidence in this case discloses a method of doing business by the plaintiffs and the United Cloak & Suit Company the most careless and loose of which this court has ever heard. There is no doubt in my mind that Munzer, the manager, has treated the plaintiffs shamefully, and that he has abused the confidence the plaintiffs reposed in him. They, however, clothed him with certain authority as their agent or manager, and they must bear the burdens incident to such investure of authority.

"'When one of two innocent persons must suffer by the fraud of a third, he shall bear the loss who enabled the third person to do the injury by giving him credit and holding him out to the world as his agent.' Davis v. Bemis, 40 N. Y. 453, note.

"This is the settled law of the State. The defendant in his action, under the form of the check in question, in my opinion was put upon its inquiry. It made none, however; but nevertheless, under the law, it is entitled to the benefit of whatever facts existed which reasonable inquiry, if made, would have disclosed. The facts above presented would, in my opinion, have been disclosed, for they existed and cannot be gainsaid. These facts, in my opinion, were sufficient 'to allay the suspicion already aroused,' and if brought to the attention of the defendant would have justified it in crediting the manager personally with the proceeds of the check, even if he in fact did not have the right thereto."

See Decision No. 1448.

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Bills and Notes: Bona Fide Holders: Value: Burden of Proof: Filling in Blanks: Payee and Maker: Notice: Rights of Pledgee.

It is seldom that one decision covers so many points of law of interest to the business world as does the recent case of Melton v. Pensacola Bank & Trust Co., Decision No. 1449. Most, if not all, of the points involved are neither novel or complicated, but as they are all of importance a brief review of the holdings will be of value.

In the first place, the court reaffirms the well-known right of a *bona fide* holder of negotiable paper for value and before maturity to hold the paper free of any defences that exist between prior parties. Said the court:

"It is also well-settled that a *bona fide* holder of a negotiable instrument who, for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, takes it by indorsement made before its maturity, holds the title unaffected by these facts and may recover thereon, although as between the antecedent parties the transaction may be without legal validity. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Goodman v. Simonds, supra, 20 How. at page 367, 50 L. Ed. 934; Railroad Co. v. National Bank, supra, 102 U. S. at page 23, 26 L. Ed. 61; Hamilton v. Fowler (C. C. A. 6) 99 Fed. 18, 22, 40 C. C. A. 47; First National Bank v. Moore (C. C. A 9) 148 Fed. 953, 78 C. C. A. 581.

"And the Kentucky Negotiable Instruments Act, supra, provides to the same effect, as follows:

"Sec. 52. 'A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.'

"Sec. 57. 'A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.'"

The well-known dispute between the various courts as to whether taking negotiable paper as collateral security for a pre-existing indebtedness constitutes a taking for value, is also once more passed upon and the court reiterates the doctrine of the federal courts that such a taking does constitute value. On this point the opinion reads:

"As the proof shows that the note in suit was pledged to the plaintiff before its maturity, it is immaterial whether it was transferred as collateral to either of the Scudamore notes at the time the loan to him was made, or afterwards to secure his pre-existing indebtedness. The rule is well settled in the federal courts that the transfer of a negotiable paper by indorsement, before maturity, as security for an

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antecedent debt, is a transfer for value in due course of business. Railroad Co. v. National Bank, 102 U. S. 14, 23, 26 L. Ed. 61; American File Co. v. Garrett, 110 U. S. 288, 294, 4 Sup. Ct. 90, 28 L. Ed. 149; Hamilton v. Fowler (C. C. A. 6), 99 Fed. 18, 22, 40 C. C. A. 47; Scherer v. Everest (C. C. A. 8), 168 Fed. 822, 831, 94 C. C. A. 346; Doe v. Coal & Transportation Co. (C. C.), 78 Fed. 62, 68; D'Esterre v. City of Brooklyn (C. C.), 90 Fed. 586, 593. And see Swift v. Tyson, 16 Pet. 1, 15, 10 L. Ed. 865; Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386; McCarty v. Roots, 21 How. 432, 438, 16 L. Ed. 162; Sawyer v. Prickett, 19 Wall. 156, 166, 22 L. Ed. 105; Oates v. National Bank, 100 U. S. 239, 247, 25 L. Ed. 580. This is also the rule in the greater number of the States and in England. See cases collected in 7 Cyc. 932; 4 Am. & Eng. Enc. Law (2d Ed.) 290; and 1 Am. & Eng. Ann. Cas., p. 275, note. And recently the Supreme Court of Arkansas in Exchange Nat. Bank v. Coe, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, recognizing that the trend of modern decisions is in favor of the rule adopted in the federal courts as tending to promote uniformity in the several jurisdictions, has expressly adopted this rule and overruled dicta to the contrary in two earlier Arkansas cases.

"And while it was formerly held by the Court of Appeals of Kentucky in Lee's Adm'r v. Smead, 1 Metc. (Ky.) 628, 71 Am. Dec. 494, that the taker of collateral for an antecedent debt without a new consideration did not become a holder for value in due course, not only is such holding on a question of general commercial law not binding on the federal courts (Swift v. Tyson, 16 Pet. 1, 15, 10 L. Ed. 865; Railroad Co. v. National Bank, 102 U. S. 14, 23, 26 L. Ed. 61), but the former law of Kentucky in this respect was changed by the enactment, in 1904, of a uniform Negotiable Instruments Act (Kentucky Acts 1904, c. 102, p. 213, Carroll's Kentucky Statutes 1909, § 3720b [Russell's St., §§ 1885, 1886]), which provides as follows:

"Sec. 25. 'Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes a value, and is deemed such whether the instrument is payable on demand or at a future time.'

"Sec. 26. 'Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.'

"It is clear that under these sections of the act one who takes a note before maturity as collateral security for a pre-existing debt is a holder for value. In re Hoppner-Morgan Co. (D. C.), 154 Fed. 249, 253; Trust Co. v. Markee (C. C.), 179 Fed. 764. And in recent cases in States in which the federal rule had not been previously followed, it is now recognized that by reason of the adoption of uniform negotiable instruments acts similar to that adopted in Kentucky, the assignee of a negotiable instrument taking the same before maturity as collateral security for a pre-existing debt is now to be regarded as a holder for value to the extent of the debt secured."

When one is a holder of negotiable paper all he need prove is that he took the same for value, before maturity and without any notice of any infirmities therein and he can recover. In fact any holder may,

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in the first instance, merely prove that the note was executed. The law then presumes all of the other facts essential to a recovery and if the parties to the instrument rely on any fact or facts as a defense, the burden of establishing the same is on them. So Decision No. 1449 holds, the court saying:

"Therefore proof of the fact of indorsement not being required under the pleadings, the fact that the note was in the possession of the plaintiff, exhibited with its petition and offered in evidence, made out a *prima facie* case that the plaintiff had become its holder for value before maturity in the usual course of business, and without notice of anything to impeach its title."

We have frequently seen that a material alteration made after execution renders an instrument void at least as to all parties to the alteration. In the case of negotiable instruments, however, one not a party to the alteration and who is a holder in due course may enforce the instrument according to its original tenor, *i. e.*, as it stood before negotiation. The alteration, however, must be material to have any effect whatsoever. That is, it must change the liability of the parties. Hence in the case we are discussing an immaterial alteration was held to be of no effect. The alteration held to be immaterial arose from the following state of facts: a note was executed on a printed form which made it payable at a certain State bank. Subsequently the bank was changed to a national bank and the note was altered by accordingly changing the name of the bank where it is payable. The court held:

"The fact that the name of the bank at which the note was payable was changed after execution from the Peoples' Bank to First National Bank, without the knowledge or consent of the defendants, does not, in our opinion, constitute a defense to the note. It is true that where no place of payment is designated in the note the subsequent insertion of a place of payment is a material alteration as against all parties not consenting thereto (2 Daniel Negot. Inst. [3d Ed.] § 1378; Whiteside v. Northern Bank of Kentucky, 10 Bush [Ky.] 501, 19 Am. Rep. 74), and that a change in the place of payment contained in a note as originally executed is a material alteration (Mitchell v. Reed, 106 S. W. 833, 32 Ky. Law Rep. 683). However, we cannot regard the change made in this case as amounting either to a change in the place of payment or the insertion of a place of payment where none had been originally specified. Under the note as originally written the place of payment was the Peoples' Bank of Sebree. This bank, as was known to most, if not all, of the makers, was a State bank, which had gone out of business as a State bank under the name about two years before, and had become the First National Bank of Sebree, which continued to do business as a national bank with the same officers, directors and stockholders as the former Peoples' Bank, and did business in the same banking house, with the old name of Peoples' Bank carved on its step. We are of opinion that, under these circumstances, the designation of the

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$5457.50 Sebree April 23 1906

On or before May 15, 1908 after date we promise to pay to the order of G. C. Sendamore

Five thousand four hundred fifty seven 50/100 Dollars

Payable at ~~Peoples Bank~~ First National Bank of Sebree.

Value received

No. _____ Due _____

R. E. Melton J. S. Thorenburg
T. B. Ramey C. H. Ramney
D. W. Sharp G. C. Sendamore

COLUMBIA BOND

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This note was originally made payable at People's Bank. Subsequently the People's Bank reorganized as the First National Bank of Sebree. All of the parties knew of this change. The note itself was then altered so as to be payable at "First National Bank of Sebree." Held that the alteration was immaterial and had no effect on the liability of the parties.

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place of payment as the Peoples' Bank was equivalent to a designation of the First National Bank as the place of payment, and that it must have been so intended by all the signers of the note; that, under the circumstances, even if the name had not been changed the note would have still been payable at the banking house of the First National Bank, the former place of business of the Peoples' Bank, and that as the change in the place of payment merely served to give a more technically accurate description of the same place of payment it cannot be held to be a material alteration. Thus in Metropolitan Bank v. Claggett, 141 U. S. 520, 527, 12 Sup. Ct. 60, 35 L. Ed. 841, it was held that the conversion of a State bank in New York to a national bank did not destroy its identity or corporate existence; that it simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction; that it remained one and the same bank and went on doing business uninterruptedly; and that it was not thereby discharged from its liability as a national bank on its outstanding circulation issued in accordance with the State law."

Where the name payee is left blank in a note it may be filled in and such filling does not effect the liability on the note in any respect. This is in accord with what we have previously stated to be the law and so the present case holds, saying:

"The fact that the name of the payee was blank at the time the note was signed by the defendants and delivered to Scudamore does not impeach its validity in the hands of the plaintiff. An implied authority was thereby given to Scudamore to fill in the name of the payee, and even if he filled it in with the wrong name, in violation of his agreement with the defendants (as to which there is no evidence in the record) this would not affect the title of the plaintiff, taking the note as holder for value before maturity, without notice. See, by analogy, in the case of filling in a blank date, Goodman v. Simonds, supra, 20 How. at page 361, 50 L. Ed. 934, and Androscoggin Bank v. Kimball, 10 Cush. (Mass.) 373, and other cases there cited as to the general authority given to fill up blanks, by signing and delivering to an agent of an instrument in which blanks are left."

The case also holds that the fact that the maker and payee of a note is the same person does not affect its negotiability. This has long been well settled and Decision No. 1449 affirms it as follows:

"The fact that Scudamore's name appears both as a maker and payee on the note does not destroy its validity as a negotiable instrument.

"It is true that in Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 S. W. 675, 20 Ky. Law Rep. 773, it was held that the assignment of a note of two obligors to a firm of which one of them was a member operated to extinguish the debt as to the obligor who thus became both obligor and obligee, and hence released the other obligor from liability on the note; and that in Deavenport v. Deposit Bank, 138 Ky. 352, 128 S. W. 88, 137 Am. St. Rep. 386, it was held that where a firm note comes into the hands of an individual member by assign-

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ment this does not pass title but operates as an extinguishment of the note itself, although he may in such case enforce contribution by the other members of the firm.

"However, section 8 of the Kentucky Negotiable Instruments Act, supra, specifically provides that a negotiable instrument may be drawn payable to the order of a payee who is its drawer or maker. Under this express provision of the act, the character of the note in suit as a negotiable instrument, and its validity as between the plaintiff and defendants is not affected by the fact that Scudamore, the payee, is also one of the makers."

Where a cashier pledges notes with his bank as security for his own indebtednes he is acting for himself and not as cashier, and any knowledge he may have as to the invalidity of the notes is not chargeable to the bank. So the court held in this case, the court holding:

"This, however, was clearly essential to constitute a defense upon the note, and obviously even if the fact of notice was provable under the pleadings, the fact that Scudamore had knowledge of the alleged want of consideration would not be chargeable to the plaintiff even although he was its cashier at the time, since, in the matter of pledging these notes to the plaintiff he was not acting in its behalf but was dealing at arm's length with the plaintiff and acting solely in his own interest. American Nat. Bank v. Miller, supra, 185 Fed. at page 343. The case here presented is obviously entirely different from that in Childers v. Billiter, 144 Ky. 53, 137 S. W. 795, in which the person who made the purchase of the note with knowledge of its infirmity was acting as the agent of the purchaser in the transaction."

The case further decides that one who, by indorsement, holds a note as collateral security for an indebtedness due him may sue at law thereon in his own name. The court said:

"Furthermore, the pledgee of a note held as collateral being a *bona fide* holder for value, may maintain an action at law thereon in his own name. See McCarty v. Roots, supra; Railroad Co. v. National Bank, supra. And section 51 of the Kentucky Negotiable Instruments Act, supra, specifically provides that:

"'The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument.'"

See Decision No. 1449.

Bills and Notes: Illegal Consideration: Bona Fide Purchaser: Notice.

State Bank of Greentown v. Lawrence, Decision No. 1450, holds that even though a note be given for an illegal consideration it may be enforced in the hands of a *bona fide* holder in due course. The court says:

"When the note was executed, the practice of medicine, without a license, was prohibited in this State, under penalty of fine. Burns' Stat. 1908, § 8410. Consequently the note in the hands of Magee was not enforceable, because the consideration therefor was an illegal one.

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"The bank purchased the note before maturity for value. The note was not void. In the hands of an innocent holder it was enforceable. Schmueckle v. Waters, 125 Ind. 265, 268, 25 N. E. 281. Appellee claims that, if it be conceded that appellant had no actual notice of the note's infirmity, the uncontroverted evidence discloses such facts as legally put appellant on inquiry into its consideration, and, if inquiry had been made, appellant could not have failed to discover the illegality of the consideration and fraud in its procurement."

This must be taken with a qualification. If the original consideration be merely *malum prohibitum* the holding is correct. If, however, the consideration be *malum in se* the instrument is absolutely void and can be enforced by no one. For example — a note is given for medical services to one who is not licensed to practice medicine. Although the consideration is illegal, it is illegal only because expressly made so by positive law. Such a note could be enforced by a holder in due course but not by the original party. Suppose, however, a note be given A in consideration of his having murdered B. This note is absolutely void and can be enforced by no one, whether a holder in due course or not.

The case also considers what notice is necessary in order to constitute one a holder not in good faith. As we have frequently seen actual bad faith is necessary and mere knowledge which would render an ordinarily prudent man suspicious is not sufficient if it does not actually render the particular person in question suspicious. The following quotation from the present case would seem to be at variance with this view:

"The law is well settled in this State that persons dealing in commercial paper are required to use reasonable diligence where the paper is offered for sale under circumstances that are calculated to excite the suspicion of a reasonably cautious person. Citizens' Bank v. Leonhart, 126 Ind. 206, 25 N. E. 1099; Giberson v. Jolly, 120 Ind. 301, 22 N. E. 306."

If this quotation stood alone it would improperly represent the law as laid down in most jurisdictions. It is qualified, however, by the following facts in the case and by what follows in the opinion. It appears that in this case the holder deliberately closed his eyes to certain suspicious circumstances in the case and the court properly held that this charged him with notice and rendered him a holder not in good faith. The court said:

"Where the circumstances show that the purchaser refrained from making inquiry lest he should thereby become acquainted with the transaction, out of which the note originated, he cannot occupy the position of a holder in good faith without notice. Schmueckle v. Waters, supra; Shirk v. Noible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Coffin v. Anderson, 4 Blackf. 408.

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"In Bank v. Bennett, 8 Ind. App. 679, 36 N. E. 551, that court said of the above doctrine: 'The rule thus laid down we regard as an extremely equitable and salutary one. No man should be permitted to willfully close his eyes, and then excuse himself upon the ground that he did not see.' When the illegality of the consideration of the note was shown, the burden devolved on appellant to show the purchase was made in good faith, without notice."

See Decision No. 1450.

Bills and Notes: Checks.

The well-settled rule that the payee of a check cannot sue the bank on which it is drawn unless the bank has certified or accepted the same is reaffirmed in Balsam v. Mutual Alliance Trust Co., Decision No. 1451, where the court says:

"The payee of a check has no cause of action against the drawee for nonpayment thereof before acceptance or certification (Neg. Insts. Law [Consol. Laws 1909, c. 38] § 325; Duncan v. Berlin, 60 N. Y. 151; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55); and, in the present case, acceptance or certification was neither pleaded nor proved."

In this case the payee of a check indorsed it to a third party. This third party had an account at a branch of the bank on which the check was drawn. He took the check to the branch bank and deposited it to his own credit. The bank marked the check "paid." Thereafter the bank discovered that the check was not good and it cancelled the credit on the books of the depositor in its branch. The court held that the crediting of the note as paid relieved the payee from all liability thereon and that the depositor's only remedy was against the bank. The court said:

"If the check was paid, and the defendant nevertheless afterwards refused to allow the credit to stand in the depositor's account, the controversy was one between the depositor and the defendant. The depositor could doubtless have assigned her claim against the defendant, not upon the check, for that had been paid, but for the balance of her account. If any such assignment to the plaintiff had been pleaded or proved, it might be necessary to determine whether or not the depositor had lost her right to recover by voluntarily taking up the check after payment and giving her own check in its place. As the record does not present this question, and as the plaintiff has no right of action against the defendant upon the check on any theory, the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event."

See Decision No. 1451.

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Bills and Notes: Promissory Notes.

In Gilbert v. Adams, Decision No. 1452, the following note was executed:

"I, Isabella V. Adams, hereby acknowledge my indebtedness to Marguerite Gilbert, for services rendered by her, for which I promise to pay her the sum of Thirty thousand dollars; and in the event of my death I hereby authorize and direct the payment of the same out of the funds of my estate. Dated. Jan. 23, 1907. [Signed] Isabella V. Adams."

It was held that there was no time for payment specified in the note and that therefore under the express provisions of the Negotiable Instruments Act the note was a promissory note. The court said:

"The Negotiable Instruments Law (chapter 38, Consol. Laws 1909; chapter 43, Laws 1909) provides:

"'Sec. 26. An instrument is payable on demand; * * * (2) in which no time for payment is expressed.'

"'Sec. 29. The instrument need not follow the language of this chapter but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.'

"I am of the opinion that the instrument at bar is a promissory note, payable upon demand; that the words, 'and in the event of my death I hereby authorize and direct the payment of the same out of the funds of my estate,' are surplusage, and in no degree affect the preceding statement, 'I promise to pay her the sum of thirty thousand dollars,' and therefore the time of payment was not postponed until the death of the maker of the note."

It will be noted, however, that the note while possibly a promissory note is not negotiable. It lacks a most important element of negotiability. It is not payable *to the order* of a named person or to bearer. Since the Negotiable Instruments Act purports to apply to negotiable instruments only, and since this note was not, it is very doubtful whether the act should have been controlling. Apparently, however, this point was not raised. Certainly it was not considered by the court. The same result, however, might have been reached through common-law principles without invoking the aid of the act.

See Decision No. 1452.

Bills of Lading: Carriers: Passage of Title.

We have had occasion in the past to treat of the effect and characteristics of bills of lading. We have seen that they have a double aspect. They are considered as embodying the contract between the shipper and the carrier and they are also considered as being documents of property. In this last aspect they are symbolical of the goods represented by them and it may be stated in general that

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possession of a bill of lading amounts to possession of the goods themselves. It is of this last phase of bills of lading that the case of Southern Ry. Co. v. Waters, Decision No. 1453, treats. It is there held that where a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor the right to the bill of lading will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be. In other words, the legal effect is the same as if the goods themselves, instead of merely the bill of lading, had been pledged as security for the draft. On this point the court said:

"Section 4134 of the Civil Code (1910) in such case expressly provides that no title passes until the drawee pays the draft thus drawn upon him. 'When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be.' When the Johnson Manufacturing Company consigned the shipment to itself, with order to 'notify Strozier & Waters,' this was equivalent to a positive statement that it did not intend to part either with the title to the shipment or the possession hereof until this draft was paid."

This case also holds that where a seller of goods delivers them to a carrier addressed to the buyer, the title to the goods will ordinarily pass to the buyer immediately upon such delivery. We quote the court:

"Unquestionably it is a general rule that delivery to the carrier of goods purchased is delivery to the consignee; but this general rule may be varied by a manifest exception thereto made by the vendor at the time of shipment."

It is to be carefully noted, however, that the question as to whether the title has passed or not is a question of intention solely and, therefore, if there is any fact in a case inconsistent with passage of title to the buyer on delivery to the carrier, the title will not pass. So this case holds.

It is to be further noticed that all of the rules we have been discussing thus far maintain only as between the immediate parties to the transaction and may not be controlling when the rights of third parties intervene.

See Decision No. 1453.

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Carriers: Liability: Modification of Liability.

We have frequently taken occasion to refer to the common-law liability of a common carrier of goods and have laid down, as is unquestionably the law, that this liability amounts practically to that of an insurer, with certain well-defined and strictly-limited exceptions. We have also seen that this strict liability of the carrier may be modified by contract. There is an irreconcilable dispute among the various jurisdictions as to whether the contract exempting from liability may extend to exemption from liability from injury or damage caused by negligence. Short of this, however, the court are agreed that there may be a limitation of the common-law liability of a carrier. All presumptions, however, are against such a limitation and the intent to limit and the terms of the contract so limiting must be clear and certain. Such are the well-settled rules of law and in accord with them is the case of Hill v. Adams Express Co., Decision No. 1454, where it is said:

"In transactions of this sort, as in other matters, the assent of both parties is required in order to make a contract. More than fifty years ago our Supreme Court declared that: 'Where a common carrier undertakes to transport an article in his line of business, the legal presumption is that he does it subject to the common-law liability, and this presumption remains until it is overcome by positive proof of a special agreement.' Pennsylvania R. R. Co. v. N. J. R. R. Co., 27 N. J. Law 100. For authority the court relied upon a decision of the Supreme Court of the United States: N. J. Steam Navigation Co. v. Merchants' Bank, 6 How. 377, 383, 12 L. Ed. 465. The doctrine thus announced entered into the reasoning of this court in Russell v. Erie R. R. Co., 70 N. J. Law 808, 811, 59 Atl. 150, 152 (67 L. R. A. 433), and Judge Vroom, in delivering the opinion of the court, declared: 'The burden of proof of showing such a limitation of liability is on the defendant company, and being in derogation of common right is to be construed most strongly against the carrier.'"

As to what will constitute a contract, this case seems to differ from the view held in most jurisdictions. The great majority of the courts, as we have seen, hold that a bill of lading constitutes as a contract between the carrier and the shipper, sufficient in itself to limit the carriers liability. The New Jersey court in the case we are considering does not follow this doctrine and holds that while a bill of lading *may* constitute a contract, it does not *necessarily* do so. Whether it does or not depends upon the circumstances under which it is given, says the court:

"The doctrine referred to was the ground of the decision rendered by the Supreme Court, in Hayes v. Adams Express Co., 73 N. J. Law 105, 62 Atl. 284, where the case in 27 N. J. Law was cited, and the doctrine was not at all disapproved by this court on review. 74 N. J. Law 537, 65 Atl. 1044. On the contrary, our decision there proceeded

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on the ground that the shipper's knowledge of a customary practice on the part of the carrier to base its charges upon the declared value of the merchandise did not of itself alone import the shipper's assent to a limitation of liability in the particular case.

"In Atkinson v. New York Transfer Co., 76 N. J. Law 608, 71 Atl. 278, we held that if the shipper knew that the rate charged for the transportation of a trunk was based upon a valuation of $100, and that the receipt tendered to her contained a stipulation limiting the carrier's liability to the amount thus stated, the acceptance of the receipt in silence estopped the shipper from afterwards asserting the value to be greater. Our decision was based upon the actual knowledge and assent of the shipper.

"Finally, in our former disposition of the present case (78 N. J. Law 333, 74 Atl. 674) we relied upon clear, and at that time uncontradicted, evidence of assent by the shipper to a modification of the common-law liability proposed by the carrier.

"It would be inconsistent with this long line of decisions, and also, as we think, inconsistent with the reason of the matter, to hold that the mere receipt by the shipper of a paper containing limitations of the common-law liability of the carrier conclusively imports the shipper's assent to such limitations. We hold, on the contrary, that the facts found by the trial judge, that neither Hill nor the driver in fact assented to the limitation of liability to fifty dollars, nor knew that the express receipt or bill of lading tendered by the company contained such a limitation, warranted his conclusion that the limitation was not a part of the contract between the parties."

This doctrine, contrary to the weight of authority, places bills of lading on the same footing as passenger tickets, baggage checks, etc. It is extremely questionable whether such a doctrine, worked out independently of any statute, is either logically or historically correct.

See Decision No. 1454.

Carriers: Liability: Commencement of Liability.

In the preceding note we have been discussing the extent of the liability of a common carrier. We have in previous issues discussed the question as to when this liability begins. As a general thing we have seen that it begins as soon as the goods have come into the control of the carrier. It is necessary, however, that the goods must be in the control of the carrier as a carrier. The question as to when the goods are under the control of the carrier has been considered. The question as to whether they are under the carrier's control *as a carrier* or not remains for discussion.

There can be no question that where the goods are delivered to the carrier simply for the purpose of transportation the liability at once attaches. The difficulty begins when the goods are delivered to the carrier with the understanding that they are to be held by it

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for a certain period before forwarding. When such holding by the carrier is for the convenience of the shipper, all courts are agreed that the extraordinary liability of a carrier does not begin until the actual forwarding begins. In the interim the carrier is liable for negligence only as an ordinary bailee.

Where, however, the holding of the goods is for the convenience of the carrier, with the assent of the shipper, the courts differ. Some courts hold that in such case the carrier is liable as a carrier immediately upon the receipt of the goods. (Shaw v. No. Pac. R. R., 40 Minn. 144; Ladue v. Griffith, 25 N. Y. 364.) Other courts on the contrary, hold that in such case the carrier is liable only from the time when the actual forwarding begins, on the ground that to give rise to the extraordinary liability of a carrier there must not only be authority *or* direction to forward, but authority *and* direction. (Watts v. Boston & Lowell R. R., 106 Mass. 466.) All courts again are agreed that if the holding up of the actual transportation is for the convenience of the carrier, without either the consent or knowledge of the shipper, the carrier is liable as a carrier from the first.

In connection with these rules it is to be noted that, where a carrier has a rule that it assumes no risk for goods unless they are received for immediate shipment, the rule is valid and will be sustained and the carrier be released from liability for goods received not for immediate shipment. This rule of the carrier may, however, be waived by it and when it is the carrier is liable from the moment of receiving the goods. So it was held in Griffin v. Atlantic Coast Line R. Co., Decision No. 1455, where it is held:

"If the cotton was accepted for shipment, whether such shipment was intended to be immediate or remote, the placing of the same upon the platform would render the defendant responsible for any damage thereto from any fire originating within the right of way, unless the plaintiff had released the defendant from such liability. The defendant could waive its own rule that it would not accept cotton upon its platform or right of way unless intended for immediate shipment, and could, notwithstanding its rule, accept the same intended for shipment, not immediately, but at some future time, in which case the cotton would clearly be upon the right of way with the consent of the defendant, within the meaning of the word 'consent' as used in the statute. Yarborough v. Railway, 78 S. C. 103, 58 S. E. 936. It is not questioned that the fire originated within the right of way of the defendant company, and that defendant would be responsible for the damage to the cotton, if the same had been placed on the platform for immediate shipment; and the case just cited shows that the defendant would be liable for such damage, if the cotton was accepted for shipment, though such shipment was not intended to be immediate, notwithstanding its stipulation by notice that it would not accept cotton, unless for immediate shipment. The notice given in this case was substantially the same as that which was shown in the

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case of Yarborough v. Railway, 78 S. C. 103, 58 S. E. 936. In that case the notice was in substance to the effect that the railroad company would not be responsible for cotton placed on the platform until the same was 'tendered to and accepted by the company for shipment.' In the case at bar the notice was to the effect that the defendant would not be responsible for cotton placed on its platform until the cotton 'is placed for immediate shipment.'"

See Decision No. 1455.

Chattel Mortgages: Sales.

In many cases the line between a chattel mortgage and an absolute sale is not distinctly drawn. This confusion arises from the fact that a chattel mortgage is on its face an absolute sale, with a condition attached, providing for a revesting of title on payment of the indebtedness. Neither a chattel mortgage or a sale need be in writing so far as the immediate parties are concerned. Where creditors and innocent third parties are concerned various statutes and recording acts change this rule, but these do not affect the parties as between themselves.

The principle we have been considering entered into the case of Dosbaugh National Bank v. Jelf, Decision No. 1456, where the facts were as follows:

"The plaintiff claimed under an oral chattel mortgage, given by W. T. Jelf to secure the payment of money advanced by the bank to enable Jelf to purchase the mules. The defendant, the widow of Jelf, claimed under the statute setting off the property to her as exempt, upon his decease. Judgment was rendered for the plaintiff, and the defendant appeals.

"Transaction between Jelf and Hamil, the seller of the mules, is related by Hamil as follows: 'He came up there to buy a span of mules from me, and we talked on the price and finally agreed; and he said if he could have until the 1st of March he would take them, and I told him I was selling him the mules worth the money, and I wanted the money; and he said he did not have the money, and would have to make arrangements for it. And he came back in a day or two, and said that he could get the money down at Dosbaugh's, but that he had not made any arrangements, but that he would give me a check, if I would keep it for a day or two, and make arrangements, and I told him it would be all right. And when he went to give me a check he said that he did not have any checkbook, but that he would leave it at the house for me, and when I went down there he had assigned over one check for $3.50, and that was on Grenola, and one for $324, on the Dosbaugh bank.'

"The first conversation with Hamil occurred about April 1st. Jelf took the mules away with him at the conclusion of the second conversation.

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The conversation between Jelf and the bank is related by its cashier as follows: 'Mr. Jelf said that he had bought a team of mules, and wanted to borrow the money to pay for them. He said that he would give us a mortgage on the mules to secure the money; that about March 1st he would have some money coming to him from his farm, which he was selling; and that he could pay the note then. I told him that we would not want to go to the trouble of writing and recording a chattel mortgage for so short a time; that we were willing to loan him the money, and would let him give us the note for the amount until March 1st, until which time we would consider the mules ours — consider the mules ours until paid for. He said "All right, and if you want a chattel mortgage on them at any time I will give it." Whereupon I drew up a note for $325, which he signed, and which we discounted, taking out the interest from February 6th until March 1st, and passed the proceeds to his credit.' Jelf's check was presented and paid a few days after his note was given."

On these facts the court held:

"The sale by Hamil was a sale for cash, and not a sale on time. The delivery of the mules was clearly conditioned upon the payment of the price by means of the check, and if the check had not been paid Hamil could have reclaimed possession of the property. Bank v. Brown, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824, and authorities reviewed in the opinion.

"Jelf had no money to pay the price, except the Grenola check of $3.50, until he borrowed it of the plaintiff, and at the time he borrowed it he gave the oral mortgage on the mules to secure repayment. The mortgage was therefore a purchase-money mortgage, by means of which Jelf obtained title. That the mortgage ran to a third person does not change its character as a purchase-money mortgage. The consent of the defendant was not essential to its validity, and, there being no instant of time when her husband was the unqualified owner of the property, no exemption rights attached."

See Decision No. 1456.

Chattel Mortgages: Principal and Agent: Knowledge of Agent.

We have seen in the preceding note that a chattel mortgage on its face purports to be an out and out sale of the property covered thereby, subject to a condition that on payment of the amount of the indebtedness, title will revert to the original holder. Before the due day of the mortgage the title is absolutely in the mortgagee subject only to the mortgagor's right to redeem. In this a chattel mortgage differs from a mortgage on real estate which latter, in most States, vests no legal title in the mortgagee, but gives a mere lien until after default and foreclosure. In the case of a chattel mortgage the title will revest in the mortgagor on the due day on tender of payment even though the mortgagee may refuse to accept the tender. So it was held in Hall & Brown Wood Working Machine Co. v. Haley Furniture & Mafg. Co., Decision No. 1457, where the court says:

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"And, even in a court of law, a tender of the debt by the mortgagor after the law day, if made before seizure of or demand for the chattels, revests the legal title in the mortgagor."

This case also deals with certain principles of the law of agency and very thoroughly discusses the rules as to when a principal is deemed bound by the knowledge of his agent. It is generally laid down that the principal is bound by the knowledge of the agent acquired in the course of business. Consequently, if the agent acquires his knowledge while engaged in work entirely outside of his employment as agent or while engaged in a scheme to defraud his principle, the principal will not be deemed bound thereby. Of course, if the principal has actually acquired this knowledged, he is bound thereby, no matter in what matter or manner the agent acquired it. As a corrolary of this, it follows that it makes no difference in matters connected with the agent's employment whether he communicates to his principal the knowledge acquired. If the knowledge has been acquired in the course of the agent's employment the principal is conclusively presumed to know it, even though he never heard of it. In the following excerpt, from the opinion in the case we are discussing, the law on this point is exhaustively considered:

"By a long line of decisions, this court is thoroughly committed to the rule that knowledge acquired by an agent prior to his agency, or in regard to matters outside the line of his duty, or while pursuing his own or some other person's business, is not notice to his principal of such fact or facts, and is not binding upon him. Mundine v. Pitts, 14 Ala. 84; Pepper v. George, 51 Ala. 195; Reid v. Bank of Mobile, 70 Ala. 211; McCormick v. Joseph, 83 Ala. 403, 3 South. 796; Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; Goodbar v. Daniel, 88 Ala. 590, 7 South. 254, 16 Am. St. Rep. 76; Bessemer L. & I. Co. v. Jenkins, 111 Ala. 135, 149, 18 South. 565, 56 Am. St. Rep. 26; Central of Ga. Ry. Co. v. Joseph, 125 Ala. 313, 28 South. 35; Pearce v. Smith, 126 Ala. 116, 28 South. 37; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 South. 607, 90 Am. St. Rep. 932; Patterson v. Irvin, 142 Ala. 401, 38 South. 121; Traders' Ins. Co. v. Letcher, 143 Ala. 410, 39 South. 271.

"The fundamental requirement is that such knowledge on the part of an agent to bind his principal 'must be limited to such knowledge or information as comes to the agent in transacting the business of his principal.' Central of Ga. Ry. Co. v. Joseph, 125 Ala. 319, 28 South. 37. This is a simple rule, easy of application, and just in its results.

"Where the agent's knowledge is of this character, it is constructive notice to the principal entirely regardless of the principal's actual knowledge. Wiley v. Knight, 27 Ala. 346. This is usually explained by saying that the law conclusively presumes that the agent has in fact communicated his knowledge to his principal. We think, however, that the better and more logical explanation is that with respect to the given transaction the agent is in law identified with his principal; that knowledge that comes to the agent, while acting in such

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matter for his principal, would have come to the principal had he been acting for himself; and that, as a rule of policy and justice, he must be equally charged therewith. Sooy v. State, 41 N. J. Law 395; Houseman v. Girard Ass'n, 81 Pa. 256–262.

"But on either theory, the rule is not a rule of evidence merely, as is sometimes declared, but a rule of substantive law.

"The Alabama rule, as above defined, is not in accord with the weight of authority in other jurisdictions, as pointed out by Mr. Freeman in his valuable note to Trenton v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 228–233, where the cases on both sides are collected and discussed; and as shown by Mr. Pomeroy in his third edition of Equity Jurisprudence (volume 2, § 672, and notes). It appears from these authorities that the more generally accepted rule is that the agent's knowledge, though acquired previously to his agency, if retained by him and carried with him into the subsequent business which he transacts for his new principal, is notice to the latter whether communicated to him or not.

"This rule we regard as both illogical and unjust — a criticism which is fully vindicated by a consideration of the numerous and unpractical qualifications and exceptions which courts expounding the rule have been compelled to adopt. In this connection we note Mr. Pomeroy's observation that 'several of the ablest English judges have, in recent cases, expressed a decided opinion against the rule itself, and while considering themselves bound by it, as far as it is settled, have wished that it should be abrogated by the legislature.' 2 Pom. Eq. Jur. (3d Ed.) § 672, note 1.

"We adhere to the rule as settled by our own cases cited above.

"There are statements in the opinion in the case of Lea v. I. B. Mercantile Co., 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, which we cannot reconcile with our view of the law as settled by our previous cases, and which require qualification. In that case it was held that, where the alleged agent was in fact the sole manager and controller of a corporation at his will, and its sole stockholder but one — the latter being a nonresident — where, in fact, he was not only the alter ego, but in effect the corporation itself, and where he acted in a single transaction for himself and the corporation, his knowledge acquired previous to his agency was notice to the corporation and binding upon it. As was well said, per Tyson, J.: 'It could be nothing but the sheerest nonsense to say that as agent he should communicate the knowledge to himself as the managing representative of his corporation. Since the corporation could acquire notice in no other way than by and through its managing head or officer, it will scarcely be doubted that notice to such officer is of necessity notice to it.' Herein is found the chief reason for the conclusion of the court, in which we fully concur.

"But the opinion goes further and lays down the rule that the agent's previously-acquired knowledge will be constructive notice to the principal, if recently acquired in a connected transaction, or if of such precise and definite character as that it must be presumed to remain present in his mind and memory during the last transaction. This rule, as there stated, is a quotation from 2 Pom. Eq. Jur. (3d Ed.) § 672, to which we have already referred. It is sought to be justified as a mere exception to the general rule conceded to exist in

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Alabama, and is declared to be in harmony therewith; and cases are cited as illustrative of and supporting this exceptional rule, viz., Wiley v. Knight, 27 Ala. 336, 346; City Nat. Bank v. Jeffries, 73 Ala. 183; White v. King, 53 Ala. 162; and Dunklin v. Harvey, 56 Ala. 177. It is sufficient to say of the first two of these cases that they merely lay down the general rule that notice to an agent, with respect to a matter as to which he is *then* serving as agent, is notice to the principal; such being unmistakably the fact in each case. It was said, it is true, in Wiley v. Knight, that 'the principal knows whatever the agent knows'; but, taken literally and absolutely, this is a patent fallacy, and the court could only have meant to include knowledge acquired while and as agent.

"In White v. King and Dunklin v. Harvey, though not expressly stated, it is to be inferred from the record that the knowledge of the agent which was held as constructive notice to his principal was acquired by the agent prior to his service as such. Both were chancery cases, and, on the pleadings and proof, the knowledge of the agent was properly if not necessarily imputed to his principal by *implication*, as we shall presently explain. But the theory of *constructive* notice was applied, inadvertently, we think, since the distinction as to the time of the agent's acquisition of the knowledge was not mooted, and was evidently not in the mind of the court, and no reference was made in White v. King to the earlier case of Mundine v. Pitts, 14 Ala. 84, 90, where the limitation is plainly declared; while in Harvey v. Dunklin the case of Mundine v. Pitts is actually cited as authority. Moreover, Judge Stone, who wrote the opinion in Harvey v. Dunklin, afterwards declared, in McCormick v. Joseph, 83 Ala. 403, 3 South. 797, that: 'Notice or knowledge by an attorney, to carry home constructive notice to the client, must be shown to have been given or acquired after the relation of attorney and client was formed. It is not enough that the notice is first and the retainer afterwards.'"

See Decision No. 1457.

Damages: Bills and Notes: Negotiability.

There are probably few branches of the law as to which greater confusion and misapprehension exists in the mind of the average laymen than the question of damages. There is a prevalent impression that damages are inflicted as a punishment by the law and that through them a man may make a profit from his loss. Except in a few exceptional actions, such as libel, slander and false imprisonment, this is not the law. Damages are supposed merely to compensate, to make good the loss. In cases of contract this is always and without exception the case. So true is this that in many cases the courts will not allow a greater measure of damages even though the parties themselves have expressly contracted therefor. If, for example, A agrees to sell B a horse for $100 and agrees that in case he breaks his contract he will pay B as damages $1,500. This provision would be upset

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by the courts on the ground that it was unconscionable and in the nature of a penalty. A would be forced to pay B only his actual damages, *i. e.*, the difference between what the horse was actually worth and the agreed price thereof. Where, however, the actual damages in the case of a breach of a contract must necessarily be speculative, uncertain and incapable of definite ascertainment, the parties may stipulate for a definite sum as damages and in such case the stipulated sum will be considered liquidated damages, and may be recovered without proof of and regardless of the actual damages. It is to be noted that this is true only when the contract is of such a nature that the damages which would arise from a breach are uncertain and cannot be computed or ascertained in advance with any degree of accuracy. Even in such a case the agreement for damages will not be upheld if it calls for an amount so manifestly exceeding the actual damages as to be unconscionable. So held the case of Hull v. Angus, Decision No. 1458, where the court says in part:

"The next case where the question of liquidated damages came into prominent notice was that of Salem v. Anson, 40 Or. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485. The defendant Anson had entered into a bond with the city of Salem to establish in that city an electric light plant in thirty days, or pay the city $5,000. He failed to establish the plant at all, and the city sued on his bond to recover the full sum mentioned. The court, by Justice Bean, in discussing the question now under consideration, laid down two rules which, though not necessarily controlling in all cases, are regarded as affording a general guide by which controversies relating thereto may be determined: (1) 'Where the contract is conditioned for the performance of some collateral agreement, the sum mentioned therein will be presumed to be a penalty, and it is incumbent upon the party desiring to recover the sum named as liquidated damages to show that it was so intended by the contracting parties.' The case in hand evidently does not come within this rule, because there is no collateral agreement. The engagements of the parties are in the alternative, and each is a part of the same agreement. Strictly speaking, one cannot be considered as a security for the performance of the other. The two are of equal dignity and force, and merely present two alternatives, the performance of either of which would be considered the performance of the entire contract on the part of the defendant. The second rule is thus stated in Salem v. Anson, supra: (2) 'When the actual damages in case of a breach of the contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract shows, or the circumstances under which it was made indicate, a contrary intention of the parties, or it so manifestly exceeds the actual injury suffered as to be unconscionable.' In the case of Sun Printing & Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, Justice White, speaking for that court, says: 'The decisions of this court on the doctrine of

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liquidated damages and penalties lend no support to the contention that parties may not *bona fide*, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract.' The principle seems to be, from a consideration of all the authorities, that where the parties are competent to contract, are equally masters of the situation, and deal at arm's length, the court of equity will not disturb the measure of damages established by the parties themselves, unless it is so grossly unconscionable and oppressive as to shock the conscience of the court and lead it to believe that, although so nominated in the bond, in the letter, it is not included within the spirit of the contract, or within the contemplation of the parties. With this principle in mind, and as if this were purely a question of liquidated damages or penalty, let us examine the transaction more particularly, and determine whether the alternative is so unconscionable as to render it inequitable to enforce the agreement as made by the parties."

The case also holds that where a note on its face refers to a mortgage to the terms and conditions of which it is subject, the note and the mortgage constitute one contract. From this the court argues that since the mortgage contains conditions, the note also contains them. Hence the note is a conditional and not an absolute promise to pay money and is, therefore, not negotiable. The court says:

"According to section 5834, L. O. L., an instrument to be negotiable must contain, among other things, an unconditional promise or order to pay a sum certain in money. The note in question bears upon its face a condition in these words: 'This note is given as a part of the purchase price of real property, and is secured by mortgage of even date herewith, and is subject to all the terms and conditions of said mortgage.' It would be doing violence to the language to say that the note is unconditional, when it expressly says upon its face that it is subject to conditions. The reference to the mortgage by the terms of the note is in effect making the note and mortgage one instrument, with the conditions rendering the note nonnegotiable. Bradstreet v. Rich, 74 Me. 303; In re Commissioners of Washington Park, 52 N. Y. 131; Casey v. Holmes, 10 Ala. 776. Taken in connection with the reference to its accompanying mortgage, making them in effect one instrument, as these authorities teach, the note amounts to a declaration by the makers that, although they have promised to pay, yet on the face of the note they reserve the option of either paying it, or within one year having it canceled. The operation of this provision is wholly within the control of the makers, and amounts to a condition destroying the negotiability of the note. The case in hand is by this circumstance distinguished from the case of the United

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States National Bank v. Floss, 38 Or. 68, 62 Pac. 751, 84 Am. St. Rep. 752, cited by appellant; for failure of consideration discussed there, as affecting the negotiability of the note, was not a matter within the control of the maker. In that case the note was fair and unconditional on its face. To be sure, interest was unpaid in part, but that was a mere incident of the principal debt, and was held not to amount to notice of dishonor. Although the consideration was an executory contract, yet there was no allegation that the holder knew of any breach of it at the time he purchased the note; hence the plaintiff in that case was a holder of the paper in due course. Here it is charged that, besides knowing all the conditions contained in the note and mortgage, the defendant Ferguson did not pay any valuable consideration for the note, and that it was assigned to him without consideration, and for the fraudulent purpose of preventing plaintiffs from exercising their right to have those instruments canceled."

It is probable that most jurisdictions would differ with this decision on the question of negotiability. The Negotiable Instruments Act provides: "An unqualified order or promise to pay is unconditional though coupled with a statement of the transaction which gives rise to the instrument." The disputed provisions in the case under discussion constituted simply a statement of the transaction which gave rise to the transaction and therefore under the act the provision in dispute would seem not to impair negotiability.

See Decision No. 1458.

Estoppel.

It is frequently stated that in law a man is estopped from doing such and such an act. Just what this means is clear from the meaning of the word estop. It does not mean that a new right is created or given by the law or by the action of the parties. It merely means that the law will not allow a man to set up a right which he may technically possess if his conduct has been such as to justify another in believing that the right in question would not be relied upon or was waived. The doctrine is a negative, not a positive one. The doctrine is of frequent application in the law and is applied in the late case of Allen v. Hance, Decision No. 1459. In this case the following quotation from the opinion of the Supreme Court of California gives the facts in a case where the doctrine was sought to be invoked and the general law relative thereto:

"The last contention of appellant is that she was not estopped, because, 'there being no personal liability, the doctrine of estoppel in pais has no application.' Waiving the fact that the estoppel in this case is founded on contract, and does not rest in pais, it must be conceded that appellant's position finds support in the language of

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Heft v. Payne, 97 Cal. 108, 31 Pac. 844. There the asserted estoppel was in pais. In an action to enforce a street assessment lien for work that had been completed after the time fixed for its performance, it was alleged that the defendant owner had expressly waived all objections which he might have by reason of the failure of the contractors to complete the work within the time fixed, and that he had stated that all he wanted was a completion of the improvement to the satisfaction of the council, and when that was accomplished no further objections would be made, and the assessment for the work would be paid; that, relying upon this, the council set aside the assessment and warrant, and ordered further work to be done, and that the contractor, relying upon the good faith of the promises, proceeded with the work and completed it to the satisfaction of the proper officers. Upon this statement, it is said by this court in department: 'It is contended that the defendant is estopped by his representations and promises from claiming that the work was not done within the time required. But this is an action purely to foreclose a lien on the land for the cost of a public improvement. There is no personal liability, and under such proceedings the doctrine of estoppel in pais has no application. Meuser v. Risdon, 36 Cal. 239.' A reading of Meuser v. Risdon, cited as the sole support for the doctrine thus announced, will disclose not only that it does not support the doctrine, but contains nothing in reference to it. In Meuser v. Risdon, the contractor had failed to perform the work, and it became necessary to relet the contract for it. The clerk of the board of supervisors, without authority from the board (even if such authority could be vested in him), undertook so to relet the contract. This court held under that state of facts, in an effort to collect the assessment for the work, that the reletting of the contract was a separate and independent proceeding, that the board of supervisors could not transfer its duties and powers to call for bids to the clerk, and that the board of supervisors had not the power to ratify the invalid act of its clerk under the circumstances, so as to give validity to these invalid proceedings. It would seem that the learned author of the opinion in Heft v. Payne, supra, must have read Meuser v. Risdon as meaning a ratification by the property owner, for only upon the theory of such ratification could the doctrine of waiver or estoppel have any application. But in Meuser v. Risdon it was not contended that the property owner had by silence or by speech, or by action or inaction, done anything in the nature of waiver, ratification, or assent. The language in Heft v. Payne, therefore, stands absolutely without support in the authority cited to uphold it. In Union Paving Co. v. McGovern, 127 Cal. 638, 60 Pac. 169, language similar to that in Heft v. Payne is used as follows: 'In an action to foreclose a lien upon land for the cost of a public improvement in which there is no personal liability, and where the proceedings are purely statutory, and the lien exists by virtue of a strict compliance with the provisions of the statute, the doctrine of estoppel in pais has no application.' The sole authority adduced in support of this declaration is Heft v. Payne. We think it will be found impossible to sustain these declarations, either in reason or by authority. Whatever of the varying definitions of an estoppel may be accepted, they differ not at all in the one essential, namely, that by an estoppel a man is precluded from pleading or proving the truth, because, in the language of Coke (Coke

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on Lit. 352a), 'a man's owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.' Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this: That a man is forbidden to show the existence of a fact because, by his past conduct, his declarations, his agreement, his deed, or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

See Decision No. 1459.

Estoppel.

In the preceding note we briefly discussed the nature of the doctrine of estoppel. Another recent case, also in the Supreme Court of California, considers in some detail the requisites of an estoppel. Before estoppel can be invoked the following essentials must be shown to exist: 1) the one to be estopped must have made by word or act a representation; 2) the one invoking the doctrine of estoppel must have been justified in relying on the representation; 3) he must have relied on it; 4) he must have acted relying on the representation, and 5) he would be injured if the representation were allowed to be withdrawn or to be shown to be untrue. When all of these elements exist in a case the one making the representation is estopped to deny it. For example: A owns a house. B by mistake starts to paint A's house. A sees him doing so, but says nothing. Here we have all the elements of an estoppel. A by his silence represents that B is painting the house with his consent. B justifiably acts on such tacit representation. B will be injured if A can withdraw his representation. Hence the law will estop A from withdrawing it. These requisites are considered in the case of Stein v. Leeman, Decision No. 1460, where the court says:

"The case lacks some of the essential elements of an estoppel. An equitable estoppel is not raised by the conduct of one party in the course of a lawsuit, unless, by reason thereof, the other party has done some act or has been placed in a position that would render it unjust to him to allow the first party to change his own position in regard to the matter. Speaking of estoppels in the course of proceedings in court, Mr. Bigelow says: 'Where, then, no wrong would be done to the court or to the other parties to a cause by permitting a change of position, a change should in principle and will in fact be allowed.' Bigelow on Estoppel, 723.

"A party suing upon a contract has a right to claim a construction thereof more favorable to him than it will bear and ask for a larger judgment than he is entitled to, and if he is refused such relief before the cause is determined, and the other party will not be prejudiced by a change of plaintiff's claim, plaintiff will still be at liberty to contend for that which is his lawful right.

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"In order to constitute an estoppel, the condition brought about by the conduct of the party to be estopped must be such that the other party will be injured or placed in a worse position if the first party is allowed to pursue another course or assert the fact to be contrary to his first statement, and the party claiming the estoppel must himself have been ignorant of the truth of the matter, or of the extent of his rights concerning the same. Boggs v. Merced M. Co., 14 Cal. 368; Davis v. Davis, 26 Cal. 40, 85 Am. Dec. 157; Dean v. Parker, 88 Cal. 287, 26 Pac. 91. These elements of estoppel, as we have seen, did not exist. The defendant may still preserve the rights he has under the contract, notwithstanding the unfounded claim of the plaintiff as to the price. The defendant was not at any time during the litigation ignorant of the terms of the contract, or of his rights under it. He was, in fact, insisting that the option had expired, and was unwilling to sell at the price he agreed to take by the terms of the option, namely, $38,720. We hold that the plaintiff is not estopped to insist now that his offer of performance was an offer to pay the true amount fixed by the contract as construed upon the former appeal."

See Decision No. 1460.

Insurance: Construction of Policies: Arbitration: Estoppel: Waiver.

It has frequently been stated by us that policies of insurance are to be construed strictly in favor of the insured and against the insurer. When there is doubt, the insured gets the benefit thereof. So many cases have held this that to-day there is no principle of law more firmly established. It is to be noted, however, that the rule maintains only when there is a doubt as to the proper construction. When the policy itself is clear and unambiguous it must be construed according to its terms and there is no place for the application of the rule we have been considering. This is in accord with the general law as to the construction of all contracts. The various rules for such construction, several of which we have heretofore considered, are only to be employed for making clear the meaning of the contract. When the meaning is clear from the wording of the contract itself, no room or need exists for employing any rules of construction. Therefore, while it is true that insurance contracts are to be construed most strongly against the insurer, this is only so when there exists some uncertainty as to the true meaning and intent of the policy. So holds the case of North British & Mercantile Insurance Co. v. Robinett & Green, Decision No. 1461, where the court says:

"Contracts of insurance, as counsel for defendants in error agree and the authorities hold, are to be liberally construed in favor of the assured; but the policy is a contract, and it is just as much the duty of the assured to comply with the plain provisions of the policy, as it is the duty of the insurer to pay the amount of the loss, when that

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amount has been properly ascertained in accordance with the terms of the contract."

In most forms of fire policies in use to-day there is a provision requiring an appraisal, if demanded, of the loss as a condition precedent to recovery on the policy. In such a case the insurer has an absolute right to demand an appraisal, and if the insured does not consent thereto and does not take the necessary steps to procure the appraisal, he cannot recover on his policy. So the cases have uniformly held and so holds the case we are considering. On this point the court holds:

"In Carroll v. Girard Ins. Co., supra, the opinion, referring to the view uniformly taken that stipulations for an appraisal are a condition precedent to the right of action on a policy of insurance, says: 'The logical result of this view is that the award is a necessary element of the plaintiff's cause of action.'

"In Grady v. Home F. Ins. Co., supra, it is held that: 'Arbitration as to the amount of the loss is a condition precedent to an action on an insurance policy, where the policy expressly provides that no action shall be sustainable until full compliance with all conditions, one of which is that in case of dispute the amount of loss shall be fixed by arbitration. Failure of arbitration through no fault of the insurance company does not abrogate a provision in the policy that no action shall be brought until the amount of the loss has been settled by arbitration, and there is nothing to show that arbitration has become impossible' — citing Hamilton v. Home Ins. Co., supra, and a large number of other cases.

"The opinion in Hamilton v. Home Ins. Co., supra, further says: 'The manifest intention of the agreement of the parties to the contract of insurance was that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company. . . . The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country' — citing a number of authorities.

"Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

This case also holds in accordance with the doctrine of estoppel, as laid down by us in the preceding note, that the doctrine of estoppel

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cannot be invoked unless the party seeking to invoke it has been placed in a more disadvantageous position that he otherwise would have been, or rather, unless he would be placed in a more disadvantageous position were the doctrine of estoppel not invoked. Closely analagous to the doctrine of estoppel is the doctrine of a waiver as applied to the law of insurance. The following quotation from a well-known and authoritative treatise on the law of insurance (Richards on Insurance (Ed. of 1910) p. 518) explains the close similarity of these two doctrines as well as their general dissimilarities: "Waiver is the voluntary relinquishment of a known right. Estoppel in pais is the bar which equity raises, in the interest of fair dealing, to prevent the one party from enforcing to the detriment of the other party, certain rights which it possesses under the letter of the contract, where, by its declaration, agreement, or conduct, it has induced the other party to rest secure in the belief that such rights have been relinquished. While waiver, properly speaking, is the voluntary abandonment of a right, estoppel includes those cases where an abandonment is inferred or imposed by the court from the nature of the conduct of the party who would otherwise be entitled to the right. Waiver rests upon the knowledge of the right, and an intention to abandon it, by the party waiving. Estoppel rests upon misleading conduct by one party to the prejudice of the other, and is forced upon the wrongdoer by the court, but only to prevent fraud, either actual or constructive." Waiver is founded upon intent, either express or implied. Estoppel is imposed regardless of intent. Waiver presents an analogy to contracts express or implied in fact. Estoppel is analagous to contracts implied in law. Just as in the case of contracts, so also in the case of waiver and estoppel, the courts are not always careful to distinguish and the terms are frequently used interchangeably. This the court appears to do in the case we are discussing, where it says:

"It is a well-settled principle with respect to the doctrine of waiver, applicable as well to insurance transactions as to other business dealings, that a waiver, to be effective against the party making it, must have occurred with full knowledge of all material facts, and must be distinctly made. And, in order for there to be an estoppel by conduct, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied, except for that conduct. Atlantic Coast Line v. Bryan, supra; Virginia-Carolina Co. v. Southern Express Co., supra, and authorities cited.

"There is no proof whatever in the record to make available to defendants in error, either the doctrine of waiver or estoppel, and the loss of the right to institute and maintain this action is due to their dereliction alone."

See Decision No. 1461.

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Quasi-Contracts: Entirety of Contracts.

We have hitherto stated that where one enters into a contract he can recover nothing whatsoever thereunder unless he can show a compliance with its terms on his part. Under the strict rule of law, as carried out to their legal extremes, in such case a party cannot recover when he has not entirely performed his part of the contract, even though the performance has been prevented by the wrongful act of the other party. We have seen that under these conditions the law through the medium of implied, or quasi-contracts, has worked out a remedy. It allows the party not at fault and who is technically unable to sue on the contract by reason of unavoidable nonperformance, to sue in disregard of the express contract as though on an implied contract for the reasonable value of the services performed or the material furnished. This doctrine was originally invoked solely for the protection of one who was not himself at fault. A like situation may arise even though the one seeking to recover be himself technically at fault.

A contracts to sell to B 1,000 barrels of oil, 100 to be delivered at the first of each month for ten months, B to pay for all on the completion of delivery. A delivers according to contract for eight months but fails to deliver the last two installments. Can he recover for the installments actually delivered? Most jurisdictions, extending the doctrine we have been considering, allow A to recover the reasonable value of the oil furnished although technically he is in default. So holds the case of Stephens Lumber Co. v. Cates, Decision No. 1462, where the court holds:

"We do not consider what we have said in the instant case to be in conflict with the holding in Sanderson v. Hagan. In the latter case there was evidence that the defendant Sanderson 'refused to receive the logs under the contract and claimed that plaintiffs should fulfill their contract.' In the instant case the defendant only claims to have rejected a small quantity of the lumber furnished by the plaintiff, and received and accepted and used a much larger portion of it, nearly all in fact.

"As stated in Greenleaf on Ev. (16th Ed.) p. 119, § 136a: 'Where the contract is entire, the general rule is that, if the plaintiff has failed to perform the whole on his part, he can recover nothing; for, being entire, it cannot be apportioned. And this rule has been often applied to contracts for labor and services for a certain term of time, where the party had served only a part of the time. But it is also conceded that if the part performance of a contract is beneficial to the promisee and has been accepted by him, though the other party can maintain no action upon the original contract, his part of which he has failed to perform, yet he may maintain a general assumpsit for the actual value of his labor and materials which the promisee has accepted and enjoyed.

"In the instant case the plaintiff sued in general assumpsit upon

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the common counts, there being no count upon a special contract designating the quality of the lumber and fixing the price per thousand to be paid for the same. The plea was the general issue. The issue was upon the quantum valebant, and the plaintiff in not relying on proof of a special contract as a basis of recovery.

"The plaintiff does not claim under a special contract. The orders and account sales were evidently introduced by the plaintiff as evidence of the receipt of lumber by the defendant. Shipman's Com. Law Pleading, p. 21.

"It is contended the evidence shows the defendant did not 'retain' the lumber, but rejected defective parts thereof, and promptly notified plaintiff. There was no evidence that defendant properly rejected any part of the lumber. There was no evidence that any part of the lumber was defective in quality. There were entries in the account sales furnished by the defendant that certain pieces of lumber were rejected as being sappy, etc.; but, even if these entries were evidence thereof, they were evidence merely of the rejection of pieces of lumber by the defendant, and not evidence that they were properly rejected. But, even if a small quantity of the lumber was properly rejected, the defendant purchased and retained a large quantity of good lumber, and for its value the plaintiff sues on the common counts only, as he had a right to do."

Some jurisdictions, however, do not agree with this holding. They adhere to the doctrine of entirety of contract and in the example cited above would allow B to keep the oil already delivered without paying a cent therefor. (Champlain v. Rowley, 13 Wend. (N. Y.) 258; 18 Wend. (N. Y.) 187; Witherow v. Witherow, 16 Ohio 238.) Even in these States, however, if B had afterwards received any more goods after A had failed in his delivery, such acceptance would amount to a waiver under the principles discussed in the preceding note and recovery against B would be allowed for the reasonable value of the goods delivered.

See Decision No. 1462.

Rescission and Reformation of Contracts.

The recovery of money paid under a mistake of fact has been more or less thoroughly discussed by us in the past. We have seen that in general the law allows such recovery. Complementary to this remedy which is allowed on the law side of our courts, equity allows rescission or reformation of a contract as the case may require when there has been a mistake in the contract's formation. All three doctrines — recovery of money paid by mistake, reformation and rescission — are inter-related and founded on the broad principle of natural justice that one man should not be allowed to reap an unjust benefit because of the honest mistake of another.

It is obvious that a mere recovery of money paid under a mistake

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of fact will not in all cases give substantial and full justice. No money may have been paid, but the party laboring under a mistake may have entered into a contract which is now being sought to be enforced against him. Here the mere recovery of money paid is futile, because no money has been paid. It is to meet this difficulty and to provide for this situation that the doctrines of rescission and reformation have been evolved by our courts. Briefly we shall glance at the nature and requisites of these remedies. Before doing so it is necessary to remark that the same qualifications that are thrown around the doctrine of recovery of money paid under mistake are also qualifications of both rescission and reformation. In all three cases, for example, there must be a mistake of fact as distinguished from a mistake of law; the mistake must be substantial; and the rights of an innocent purchaser for value must not have intervened.

Rescission means that the law, where a substantial mistake of fact is shown to have entered into the formation of a contract, will annul or rescind the contract. As a pre-requisite, of course, the law will compel the one invoking the court's aid to restore anything he may have received under the contract. The theory is that because of the mistake there never has been a meeting of the minds and that consequently there never has been a contract. Therefore, it is sought to restore the parties to the situation in which they were before the transaction took place. In such case the contract is not enforced, but declared void.

In the case of reformation the law to effectuate the intent of the parties will change a contract, which has been drawn by mistake so as not to express the true intent. Suppose the minds of the parties are in accord, but in drawing the formal contract a mistake is made so that the contract as drawn does not express the true intent of the parties. This presents a proper case for a change or reformation of the contract since there has been a true meeting of the minds, but only an incorrect *expression* thereof. Where rescission is invoked the mistake must have caused a non-meeting of the minds. Where reformation is proper the mistake must merely have caused a true meeting of the minds to have been incorrectly expressed. From this it follows that for rescission the mistake need not necessarily have been mutual, while for reformation it must have been. So it is held in the case Fraizer v. State Bank of Decatur, Decision No. 1463, where the court says:

"The argument of learned counsel for defendant is based upon a misconception as to the difference between reformation and recission of a written contract on account of mistake of one of the parties. The difference is a very distinct one, for the reformation of a contract involves an effort to enforce it as reformed, whereas rescission involves an effort to abandon and recede from a contract which the party did

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not intend to make. One of the parties to a contract cannot have it reformed on account of mistake which is not mutual, for to do so would be to enforce the reformed contract which the other party had not intended to make. But a different question is presented where one of the parties to a contract seeks to have it rescinded because of a mistake on his part, for that makes only a case of there being no contract between the parties on account of the fact that there has not been a meeting of the minds of the contracting parties.

"Nor does this violate the rule of evidence which forbids varying or contradicting the terms of a written instrument. The instrument did not become the evidence of the contract between the parties until it was accepted, and, if it was accepted by a mistake as to its contents, it constituted a mistake as to the identity of the subject-matter as much as if it had been the delivery of any article sold and purchased."

See Decision No. 1463.

Sales: Passage of Title: Delivery to Carrier.

The gist of a sale is the transfer of title. As between the parties themselves the exact time of the passing of title is only a question of intention. Whenever the parties so agree, then title at once passes without further act or formality. Hence it follows that neither physical delivery of the goods, nor payment of price nor anything else is essential to the passing of title. Intent alone controls. So it is held in Hill Veneer Co. v. Monroe, Decision No. 1464, where it is said:

"A sale is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise. In the present case there was no different intention or agreement, expressed or implied. The sale was unconditional. There is no doubt that the delivery to the common carrier of the property in question was a delivery to the purchaser. All the requisites of a delivery were observed, whether determined by the law of Pennsylvania or North Carolina." The conclusion is the same.

It must be carefully and persistently borne in mind that what we have said applies to the immediate parties to the transaction only. When third parties intervene, as we have seen to be the case with chattel mortgages (see discussion of Decision No. 1456, **ante**), entirely different rules may maintain.

While it is true as between the parties intent controls the passing of title, there are numerous rules concerning such passage which have become well-settled in the law. In reference to them much confusion

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has arisen caused firstly, by a failure of some courts to distinguish between those cases where the immediate parties alone were concerned and those cases where the rights of third parties had intervened, and secondly, by considering such rules positive declarations of law instead of mere aids in ascertaining the intent of the parties. All of these rules as to passage of title are, properly considered, mere rules of construction, mere helps to arriving at the intent of the parties when such intent is doubtful. Like all rules of construction they are to be used only when the contract itself is not clear on the point involved and will always yield to a clear expression of intention.

One of the best settled and most frequently applied of these rules holds that a parting with the physical control of the goods by the seller indicates an intent to transfer title. As a corrollary of this it is held that passage of title is to be presumed when goods are delivered by a seller to a carrier billed to the buyer. Nor does it make any difference whether the buyer has designated a particular carrier or not, except that when he does so designate, the seller must follow his instructions or he has not attempted to fulfil the contract, and in such case there can be, of course, no passage of title. On the points we have been considering, Decision No. 1464, says:

"The Supreme Court of the United States, in an opinion delivered by Justice White in U. S. v. R. P. Andrews & Co., 207 U. S. at page 240, 28 Sup. Ct. at page 104 (52 L. ed. 185), says:

"That as a general rule the delivery of goods to a common carrier for account of a consignee has effect as delivery to such consignee is elementary. That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question. Certain, also, is it that, on the delivery of goods to the consignee or his order, the acceptance by the consignee of such bills of lading constitutes a delivery."

And it is not inconsistent with a proper delivery that the carrier has not been designated by the purchaser, but it is sufficient that the goods have been delivered to the carrier usually employed in the transportation of the goods from the place of the seller to that of the purchaser, as was done in the present instance.

True, the purchaser refused to receive the goods when they arrived, with the manifest intent of returning the goods to the vendor, so as to prevent any loss of the price to the consignor. This was done without any actual intent to defraud any one, but with an honest desire to protect the vendor. This action was not, however, communicated to it, and the contract could only be rescinded, altered, or revoked with its consent, no matter what action the vendee might have taken. A contract is always mutual between the parties, and one cannot in any manner revise a mutual contract without the actual

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or implied consent of the other. But the purchaser had a right to change its mind in this respect, at any time before communicating its intentions to the vendor. This was done by the receiver, who succeeded to all the rights of the insolvent company. Moreover, the proposed action for the return of the lumber would never have been thought of, had the creditors not refused an extension and thus postponed the receivership proceedings. It undoubtedly would have been accepted and used in conducting the insolvent's business.

See Decision No. 1464.

Sales: Warranties: Remedies.

As we have frequently seen, and it has been decided times without number, there is always in an executory sale of goods an implied warranty of merchantibility. By this is meant that on an executory sale of goods it is part of the seller's duty to deliver goods which shall be free from defects, whether latent or patent, which would render them unsellable or useless for the purposes for which such goods are generally used. This is one of the best known and most thoroughly adjudicated of all the implied warranties, and its existence is upheld in practically every jurisdiction. While, however, all courts are agreed as to the existence of this warranty, there is a wide difference of opinion as to its effects and the remedies on its breach. All States seem to be agreed that when goods are tendered which violate this warranty, they may be refused, and with them the purchase price, or if that has been paid, it may be recovered. Some States in addition to this allow the buyer to receive the defective goods and then sue the seller for his damages; i. e., the difference between what the goods would be worth if they complied with the warranty and what they are actually worth as they stand. In certain other States the buyer is confined to the first of these remedies, at least where defect is patent. In these States if he accepts goods which violates an implied warranty, he is deemed to have waived the defects, and he has no remedies whatsoever. Until very recently this last view was the New York doctrine, and it is applied in the case of Tichnor Bros. v. Barley, Decision No. 1465, where the court says:

"'The contract of sale in this case was executory, and it was implied as a part of the contract that the goods would be of merchatable quality, and, if they were not so, the defendant had a right to rescind the contract by returning or offering to return the goods; and, failing to do this, it would be conclusively presumed that they were fit and suitable, or at least that he was satisfied with their quality." Hargous v. Stone, 5 N. Y. 73; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Mason v. Smith, 130 N. Y. 480, 29 N. E. 749.

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In the case of Mason v. Smith, supra, Judge Haight states the rule applicable to such a case as this, as follows:

"The contract for the sale and delivery of the gloves was executory. It became the duty of the defendants on the arrival of the goods, or within a reasonable time thereafter, to examine them and determine whether or not they were of the kind and quality ordered, and, if they were found not to comply as to quality or kind, to promptly rescind the contract, and either return or offer to return the goods to the plaintiffs. Reed v. Randall, 29 N. Y. 358 [86 Am. Dec. 305]; Gaylord Manufacturing Co. v. Allen, 53 N. Y. 515; Coplay Iron Co. v. Pope, 108 N. Y. 232 [15 N. E. 335]."

"The rule reuiring a return or offer to return under an executory contract of sale is inflexible." Per Houghton, J., in Cooper v. Payne, 103 App. Div. 118, 122, 93 N. Y. Supp. 69.

On Sept. 1, 1911, the Uniform Sales Act went into effect in New York (see October, 1911, issue), and that act gives the double remedies on breach of an implied warranty. Consequently if the transaction in the case under discussion had arisen subsequently to Sept. 1, 1911, a contrary result would have been reached.

See Decision No. 1465.

Statute of Limitations.

In every State there are in force statutes of limitations. Their general nature is always the same. They limit the time in which an action may be brought on a claim. The exact period within which an action may be brought varies to some extent in the different jurisdictions. In the majority of States a six year's period is prescribed for actions on ordinary contracts, while there is a twenty year's period for contracts under seal. For example: On May 1, 1900, A borrows $100 from B. B may sue on this debt at any time up to May 1, 1906. It makes no difference whether B recovers judgment prior or subsequent to May 1, 1906. So long as he has started his action by that date he is on time. After such date the law does not consider the debt cancelled or destroyed. It still exists, only it cannot be enforced. Any act by the debtor during the period which is a recognition of the debt starts the period anew. In the example cited if A had paid interest on the $100 borrowed on April 1, 1905, B would then have until April 1, 1911, to sue on his claim. So also if A had not paid interest but had written to B acknowledging the indebtedness.

Since the law does not consider the debt wiped out by the running of the statute, a debt that has been barred may be revived. A mere promise by the debtor to pay the debt made after the statute has run, is sufficient to revive, even though there has been no new consideration for the new promise. Practically speaking there is no considera-

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tion at all for the new promise, and hence under principles heretofore considered by us, there should be no enforcement of such promise. Technically the law does not enforce the new promise. It merely looks on the new promise as a reviver the old debt or a waiver of the statute, and the recovery is on the old debt.

If the promise, however, which it is claimed revives the barred debt is conditional, performance of the condition must be shown before the debt will be revived. So it is held in Francis v. Roycroft, Decision No. 1466, where the court says:

"Assuming, without deciding, that those statements constituted a sufficient acknowledgment of the debt, the promise to pay was conditional; and it is well settled that, where a conditional promise is relied upon, performance of the condition must be shown, whether the promise be made before or after the statute has run. Dean v. Hewit, 5 Wend. 257; Tompkins v. Brown, 1 Denio 247; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Brooklyn Bank v. Barnaby, 197 N. Y. 210, 90 N. E. 834, 27 L. R. A. (N. S.) 843.

"The plaintiff rested, without attempting to prove that the father's estate had been settled, whereupon the learned trial court correctly ruled that it was necessary for the plaintiff to prove the happening of the condition, and dismissed the complaint. The plaintiff was then allowed to reopen the case, and to call the defendant as a witness to prove the happening of the condition. She testified that her father died May 19, 1900, that his estate had not been and could not be settled, as she understood it, until the death of her brother; that she had received from the executors some amount between $1,000 and $2,000; that, when she made the conditional promise relied upon, she had in mind the settlement of the estate upon the death of her brother, who was suffering from a chronic malady, as her father-in-law knew. It did not appear, and no attempt was made to show, under what circumstances the father's executors had advanced money to the defendant, and no attempt was made to show that there had ever been any accounting by them or judicial settlement of their accounts. However, at the close of the entire evidence, the court directed a verdict for the plaintiff, evidently upon the theory that the happening of the condition was shown by proof that the defendant had received a sufficient sum from her father's estate to pay the claim in suit, though she testified that the entire amount received by her was used in the payment of other debts of her deceased husband.

"So far as the defendant is concerned, her father's estate will not be settled until there is either a judicial settlement and a decree for distribution and the payment to her of her share, or at least until the executors, without a judicial settlement, pay her the share of the estate bequeathed to her by her father. There is nothing in this record to show the amount of the estate or the amount bequeathed to the defendant. As commonly understood, the word "settlement" involves a finality. To "settle" a debt means to discharge it. Part payment does not amount to a settlement, unless the debt is discharged. The defendant did not say that she would pay as soon as she received a sufficient sum from her father's estate, and therefore the mere proof that she had received enough to pay the amount sued

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for did not satisfy the condition. Doubtless the statute does not commence to run against the new promise until the happening of the condition, but the plaintiff cannot rely upon the promise to avoid the plea of the statute in a suit on the original indebtedness without proving the happening of the condition; i. e., that as to the defendant her father's estate has been settled by the payment to her of her distributive share, or of the amount bequeathed to her."

See Decision No. 1466.

Sunday Contracts: Telegrams.

In many States contracts made on Sunday, unless for works of charity or necessity, are absolutely void. No action in such case can be maintained thereon, as the contract in the eyes of the law is absolutely nonexistent. In other States Sunday contracts are merely voidable, and in such case they may be enforced, unless one of the parties at least exercises his right to declare the voidable contract void. Indiana agrees with the latter view, as is shown by the late case of Western Union Telegraph Co. v. Fulling, Decision No. 1467. The facts as stated by the court were as follows:

"The complaint shows that on Sept. 8, 1907, the telegram in question was delivered by appellee to appellant at Terre Haute, Ind., to be sent to the former's wife at Boonville, Ind. Among other facts, the complaint alleges that appellee, on said day, at the city of Terre Haute, Ind., informed appellant that he desired to send a message over its lines and wires to his wife in Boonville, Ind., if the same could be delivered to her that same day or evening, and if it could not be delivered on that day or evening he did not want to send it at all, for, unless it was delivered on that day, it would be useless to send it; that appellant then and there informed appellee that the message could and would be delivered on that day, whereupon appellee then and there prepared and delivered to appellant, charges demanded prepaid (omitting the name and address of sendee and sender), the following message: 'Late trains prevent being home till morning.' It is also alleged that appellant negligently failed to transmit said message with impartiality and in good faith, nor in the order of time in which it was received, etc. The answers to interrogatories show that said Sept. 8th was Sunday."

The company sought to be released from its liability because of the negligent delay in the transmission of the telegraph on the ground that the telegram constituted a contract which was made on a Sunday and could not, therefore, be enforced. The court overruled this contention, saying:

"Appellant contends that it did not incur the penalty for its failure to transmit the message, because the contract was made on Sunday, unless a necessity existed for its transmission on that day and that it had notice of such necessity. It appears from the complaint that the

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message in question was delivered to appellant on Sept. 8, 1907, for transmission on that day, and this court judicially knows that Sept. 8, 1907, was Sunday. Roberts v. Farmers' & Merchants' Bank, 136 Ind. 154, 36 N. E. 128.

"From the facts exhibited by the complaint, appellee clearly gave appellant to understand that transmission and delivery of the message on the day mentioned was essential; otherwise the sending of the same would be useless. With that understanding, appellant took appellee's money, received the message, but failed to transmit and deliver it "with impartiality and in good fatih, and in the order of time in which it was received." Appellee's conversation with appellant, and the contents of the message, would certainly convey to the mind of an ordinary person the cause of appellee's delay in arriving home, and under the circumstances was important. It was a word from the husband to the wife. Its tranquil effect on the mind of the wife for the unexplained delay of the husband's arrival home is apparent, and of itself sufficient to prompt a considerate husband in sending the message. If this only was its purpose, the necessity is shown (Burnett v. Western Union Tel. Co., 39 Mo. App. 599); and appellant in accepting it, and in undertaking to deliver it, did not in any wise make it amenable to the statute (section 2364, Burns 1908) which it now seeks to use as a shield in avoiding liability for a failure to perform a statutory duty. Section 5780, Burns 1908. The contract in question, although made on Sunday, was merely voidable."

See Decision No. 1467.

Trade Marks and Trade Names: Unfair Competition.

The two doctrines of Trade Marks and Trade Names and of Unfair Competition are so nearly allied and are so similar in many of their characteristics that they are often used interchangeably. They differ, however, in many important respects. A trade mark or name is a technical property right. It must not be descriptive of the property or in common use, but must be an arbitrary or fanciful appellation. It must have been appropriated by the one claiming it and must have been used by him exclusively. The ground of the doctrine is the property right of the claimant in the mark or name.

Unfair competition is of broader scope. It is founded partly on the property right of the claimant, but more largely on the theory of protecting the public from deception. Under this doctrine any copying of the goods of a rival which discloses an attempt and an intent to copy those goods and to palm off the imitations as the genuine, is prohibited. This doctrine will protect from imitation features which could not be properly the subject of a trade mark or name. Indeed, under this doctrine, a man, in a proper case, will even be restrained from using his own name. An application of the doctrine and an outline of its principles, will be found in the case of World's Dispensary Medical Ass'n. v. Pierce, Decision No. 1468, where the court says:

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"Appellant's contention that the judgment is too broad and drastic is well founded. Its restraint of the defendant from the use in any way of the designations 'Dr. Pierce' or 'Dr. Pierce's' is legal and just, because he is not a licensed physician, nor entitled to practice under the law of the State. Public Health Law (Consol. Laws 1909, c. 45), §§ 161, 174. The defendant has, however, the right to use his own name in his own business. It is a general principle of law that one's name is his property, and he has the same right to its use and enjoyment as he has to that of any other species of property. Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. ed. 247. It is, however, also a general principle of law that no man has the right to sell his products or goods as those of another. He may not, through unfairness, artifice, misrepresentation or fraud, injure the business of another, or induce the public to believe his product is the product of that other. The law protects the honest dealer in the business which fairly is his, and the public from deception in trade. In this case, as in others which have been before the courts, these principles must, because of the identity in the surname of the defendant and the trade name used by the plaintiff, be reconciled and amalgamated. The plaintiff and its predecessor, Dr. Pierce, solely through a long period prior to 1899, associated the name 'Pierce' with the proprietary remedies sold by it, and which had acquired a high reputation and an extensive market. The name designates and causes the public to buy the remedies with which it is associated as those of the plaintiff. It, when associated with the defendant's remedies, is "calculated and designed to deceive and defraud the public, and the buyers and users of the plaintiff's proprietary remedies and tablets.' The defendant has the right to use his name. The plaintiff has the right to have the defendant use it in such a way as will not injure his business or mislead the public. When there is such a conflict of rights, it is the duty of the court so to regulate the use of his name by the defendant that, due protection to the plaintiff being afforded, there will be as little injury to him as possible. Defendant should so use his name in connection with his remedies that he will obviate deception, or with an explanation which will inform or be a notice to the public that those remedies are not those of plaintiff. Herring-Hall-Marvin Safe Co. v. Hall's Safe Company, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. ed. 616; Devlin v. Devlin, 69 N. Y. 212, 25 Am. Rep. 173; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489.

"We have already stated that the defendant cannot use his name with the prefix 'Dr.' We have concluded that due and adequate protection will be afforded to the plaintiff and the public if the defendant is enjoined additionally from using the words 'Pierce' or 'Pierce's' in advertising, describing, designating, labeling, or selling his proprietary remedies, unless said words be immediately preceded on the same line therewith by defendant's first or proper Christian name and his middle name or the initial letter thereof in letters identical in size, color, style of type, and conspicuousness with those of said word, so that said word shall not appear for any of the purposes aforesaid, except when thus conjoined with the words 'Robert J.' or 'Robert,' followed by the middle name of the defendant.

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"The judgment should be modified, so that the restraining part thereof will provide: 'Adjudged that the defendant, his servants, agents, and employees, be forever enjoined and restrained from putting up, selling, advertising, or offering for sale any tablets, proprietary remedy, or product, manufactured by or for the defendant, under any name having the words 'Dr. Pierce' or the words 'Dr. Pierce's' as a part thereof, or in boxes or packages having upon them or bearing labels having upon them any name having the words 'Dr. Pierce' or the words 'Dr. Pierce's' as a part thereof, and from using the words 'Dr. Pierce' or the words 'Dr. Pierce's' in the business of defendant, and from using the word 'Pierce' or the word 'Pierce's' in advertising, describing, designating, labeling, or selling the tablets or proprietary remedies manufactured and sold by or for the defendant, unless said word be immediately preceded on the same line therewith by the defendant's first or proper Christian name and his middle name or the initial letter thereof in letters identical in size, color, style of type, and conspicuousness with those of said word, so that said word shall not appear for any of the purposes aforesaid, except when the words 'Robert J.' or 'Robert' immediately followed by the middle name of the defendant in the form hereinbefore provided are conjoined with it.'"

See Decision No. 1468.

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NOTES OF RECENT CASES.

Accord and Satisfaction.

In HOFFERT v. DUTTON, 132 N. Y. Supp. 360, it was held that, where there was no dispute as to the amount of defendant's liability, a check sent by defendant for a less amount and marked "in full payment" would not constitute an accord and satisfaction even though accepted and cashed by the plaintiff.

Accord and Satisfaction.

On the other hand, such a check sent under like conditions, where there has been a dispute as to the amount of the liability, will constitute an accord and satisfaction and will bar any action for the remainder of the claim. This is the holding in OLSON v. BURTON, 141 S. W. (Tex.) 549. Such is the well settled law as we have seen in past discussions.

Bills and Notes: Bona Fide Holder.

PARKS v. JOHNSON, 119 Pac. (Idaho) 52, holds that one who takes a negotiable instrument without inquiry, under circumstances which would make an ordinarily prudent man suspicious, is not a bona fide holder. As we have hitherto seen, this is not in accord with the prevailing rule under which actual bad faith is necessary to constitute one a holder not in good faith.

Bills and Notes: Holders in Due Course.

To constitute one a holder in due course it is necessary that he take for value, before maturity and without notice of any defenses. So the law is reaffirmed in EQUITABLE TRUST CO. v. WERE, 132 N. Y. Supp. 352.

Bills and Notes: Holders in Due Course.

Once one is a holder in due course he holds the instrument free from any defenses which the prior parties may have had as between themselves. This is, of course, elementary and is the basis of the decision in EQUITABLE TRUST CO. v. GOMPERT, 132 N. Y. Supp. 321.

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Brokers: Right to Commissions.

PEHL v. FANTON, 119 Pac. (Cal.) 400, holds that a broker employed to effect a sale is entitled to his commission when he produces a person ready, able and willing to buy at the seller's terms. It makes no difference whether the sale is afterwards consummated or not. The broker has done his part and is entitled to be paid.

Carriers.

At common law a carrier of goods is practically an insurer of their safety. If they are destroyed even without any fault or negligence on the part of the carrier he is nevertheless liable. So it is once more held in OREGON SHORT LINE RY. v. BLYTH, 118 Pac. (Wy.) 649. As we have hitherto seen this rule is subject to the qualification that if the goods are destroyed or damaged through an act of God, an act of the public enemy, the fault of the shipper, the inherent nature of the goods or by process of law, the carrier is not responsible.

Contracts.

HIRSCH & SONS v. PERU STEEL CASTING CO., 96 N. E. (Ind.) 807, lays down that a contract is formed by an offer on one side and an unconditional acceptance on the other. The acceptance must be made before the offer is withdrawn and must be exactly in the terms of the offer. An attempted acceptance which differs from the offer is in effect a new offer which must in turn be accepted.

Contracts: Consideration.

Consideration, as we have frequently seen, is necessary to support a contract. Not only must there be consideration, but this must be a legal consideration, i. e., the giving up of a legal right. The giving up or the recognition of a mere moral right is not sufficient. This principle, after much hesitation in the early history of the development of our law, has become firmly embeded in our jurisprudence and was controlling in the case of GOOCH v. GOOCH, 73 S. E. (W. Va.) 56.

Contracts: Construction.

We have often seen that if there are several instruments embodying the intent of the parties to a transaction, they must all be considered together in determining the respective rights. Since this, however, is merely a rule for the ascertainment of the true intent of the parties, it does not apply where the parties have made clear that the various instruments should not be taken together, but that one of them alone was to be finally determinative of all rights. So it was held in BARKER v. SARTORI, 119 Pac. (Wash.) 611.

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Contracts: Construction.

BLAEHOLDER v. GUTHRIE, 119 Pac. (Cal.) 524, reaffirms the rule that where there is any uncertainty or ambiguity in a contract, the actions of the parties under the contract may be taken into consideration in construing the ambiguity.

Contracts: Construction.

When contracts are optional in respect to one party, but not optional as to the other, they are to be strictly construed in favor of the party who is bound and against the party not bound. This rule for the construction of contracts is laid dawn in FRANK OIL CO. v. BELLEVIEW GAS AND OIL CO., 119 Pac. (Okl.) 260.

Corporations: "Ultra Vires" Contracts.

STRICKLAND v. NATIONAL SALT CO., 81 Atl. (N. J.) 828, defines an ultra vires contract of a corporation as one beyond the statutory or charter powers of a corporation but not one expressly prohibited by statute, wrong in itself or against public policy.

Corporations: "Ultra Vires" Contracts.

In most jurisdictions it is held that a corporation may repudiate an ultra vires contract and recover back anything it has paid thereunder. If, however, the corporation has itself received anything by virtue of such contract it must restore all so received before repudiation. Such was the holding in WALLER v. GORMAN MERCANTILE CO., 141 S. W. (Tex.) 833.

Insurance: Riders.

All who have dealt with fire insurance are familiar with the little slips embodying special provisions, which are almost always pasted to the policies. These slips are called "riders." They are a part of the contract for all purposes just as thoroughly as if they were actually written into the body of the policy. So holds SCHARLES v. N. HUBBARD, JR., & CO., 131 N. Y. Supp. 848.

Insurance: Subrogation.

At page 66a of the January, 1912, Quarterly we discussed the doctrine of subrogation as applied to insurance. Much of what we there said is reaffirmed by N. Y. C. & ST. RY. CO. v. ROPER, 96 N. E. (Ind.) 468, which holds that where an insurance company paid to insured a loss caused by the negligence of a railroad company in the burning of the insured's property, such payment constituted an equitable assignment of as much of insured's claim against the railroad company as the insurer had paid to insured and subrogated the insurer to the rights of the insured against the railroad company to the extent of the insurance paid.

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Railroads: Stations.

The right of the Corporation Commission of Oklahoma to require a railroad to provide and maintain suitable terminal facilities in the way of stations, depots, waiting-rooms, etc., is upheld in ST. LOUIS & S. F. R. CO. v. SUTTON, 119 Pac. (Okla.) 423.

Sales: Sales by Sample.

If there is a sale by sample and the goods do not conform to the sample there is a breach of the implied warranty and the buyer may refuse to receive the goods. Such was the decision in KAHN v. PRINCESS SHIRT WAIST CO., 132 N. Y. Supp. 337.

Sales: Warranty: Remedies.

SANDERS & ADKINS v. JOHN Q. MOSBARGER & SON, 141 S. W. (Mo.) 720, holds that where there is the breach of a warranty either expressed or implied the buyer has his choice of either accepting the goods and suing for his damages or of returning them and recovering back the purchase price.

Sunday Contracts.

The Penal Code of Georgia prohibits all work and transaction of business on Sunday except a "work of charity." Under this law in FEW v. GUNTER, 72 S. W. (Ga.) 720, a note given on Sunday by one confined in jail to his lawyer for the purpose of retaining the lawyer to secure bail was upheld as in the nature of a "work of charity."

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Banks and Banking: Checks: Payment to Wrong Person.

It is generally held that a bank is bound to pay a check drawn to the order of a definite person to the person named or to his order. If it pays to any one else it is still liable to the drawer of the check for the amount so paid. Hence, if a check be drawn by A to the order of B, and the bank pays C without B's indorsement, the bank is liable to A for the amount so paid, no matter how great was its care and good faith.

As a general thing this is true, but, like almost all rules of law, it has some exceptions. One of these is illustrated in the case of McHenry v. Old Citizens' National Bank of Zanesville, Decision No. 1469. Wilson was known to plaintiff, and came to plaintiff with a man whom he introduced as George Thresh, who desired to borrow some money on bond and mortgage. The stranger stated that he owned certain property on which he wished to borrow. Plaintiff searched the title of this property and found that it was in the name of George Thresh. He thereupon took a mortgage from the stranger and gave him a check for $3,000 payable to the order of George Thresh. The bank cashed the check also on the identification of Wilson. It subsequently developed that the stranger was an imposter and not the George Thresh who owned the property. The court held that the bank was relieved from liability, notwithstanding the fact that it paid the check to a person other than the drawee named therein. The court said:

"The discussion by the learned counsel has taken a wide range. We do not, however, consider that it is necessary for us to take space with extended discussion or citation of authorities respecting the question of the general duty and liabilities of banks in dealing with the checks of their depositors. The question simply is whether, under the circumstances shown by the record in this case, the drawer of the

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check ought to prevail as against the bank. Ought the bank to be held liable as for a negligent payment on a forged indorsement? We think not, and the refusal may be placed upon two grounds. One that, there being no proof that the name of the person who received payment of the check was not George Thresh, there is no evidence of a forgery in any legal sense; and another that under the well-established rule (Selser v. Brock, 3 Ohio St. 302; Ogden v. Ogden, 4 Ohio St. 182; Bigelow v. Comegys, 5 Ohio St. 256; Resor v. O. & M. Rd. Co., 17 Ohio St. 139; Ramsey v. Jones, 41 Ohio St. 685) that, where one of two innocent persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence and commits the first oversight must bear the loss, the plaintiff is estopped by his own lack of caution to now demand payment of the amount of the check by the bank. The principle is of wide application, and is illustrated in many cases relating to the illegal possession of personal property by a wrongdoer fraudulently personating the real owner, and thus clothing himself with indicia of ownership. A number of these cases are referred to by counsel for defendant in error, and will be found cited in the reporter's notes.

"It is important to note that the case at bar is to be distinguished from many in the books where the bank was sued by the payee of a check wrongfully paid to one personating the payee and forging his signature. Of such cases is that of Dodge v. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, and Id., 30 Ohio St. 1. It is to be noted, also, that a clause of the opinion in the last cited report indicates that had the defendant shown that the person to whom the check was delivered by the drawer was in fact the person whom the drawer intended to designate as Frederick B. Dodge, a different question would have been presented, and it is a fair inference, considering the entire report of the case, that, if the suit had been brought by the drawer instead of the payee, the opinion of the court upon the question of liability might have been different. Nor do we think that the case of Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655, much relied upon by plaintiff's counsel, sustains their contention. The facts were essentially different; there being no negligence shown on the part of the drawer of the check."

It will be noted that in this case the person who received the money, although not the person named in the check, was the *actual* person who was intended to receive it by the drawer. This brings the case into exact accord with the cases hitherto discussed by us on delivery by a carrier to the wrong person.

See Decision No. 1469.

Banks and Banking: Deposits.

It may often be important to determine as to exactly where rests the legal title of paper deposited in a bank. There is, of course, no dispute as to where is the title to the proceeds of the paper once it is collected. As we shall see in the succeeding note the title to the pro-

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No 911

OLD CITIZENS NATIONAL BANK, ZANESVILLE, OHIO.

Zanesville, O., Nov. 5. 1904

Pay to the order of George Shrock $2.850.

Two thousand eight hundred fifty Dollars

James McHenry

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This check was drawn to the order of George Thresh, the maker thinking that the person to whom it was delivered was George Thresh. He was not, but was an imposter. Payment to the imposter was held to exonerate the bank.

See Decision No. 1469.

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ceeds is in the bank just as if money itself had been deposited in the first instance. The legal title of deposits is always in the bank, while the bank is in the position of owing its depositor the amount to his credit. The question, however, is not so clear when paper is deposited in a bank but has not yet been collected. Greensburg National Bank v. C. Syer & Co., Decision No. 1470, holds that the passing of the title depends on the intention of the parties, and this necessarily is a question of fact and not of law. The court said:

"After the testimony was closed, the court gave to the jury the following instruction: 'The court instructs the jury that the question as to whether or not the title to the draft deposited by Hornung with the Greensburg National Bank passed to the bank or remained in Hornung is one of the facts to be determined by the jury, under all the facts and circumstances of this case as proven by the evidence. If the jury believes from the evidence that the greensburg National Bank received the draft as a deposit to be treated as cash, and that such was the intention of said bank and Hornung at the time said draft was deposited, then title to the draft passed to the bank and the jury should find in its favor; but if the jury believes from the evidence that it was the intention of the bank and Hornung, at the time of the deposit of the draft, that said draft should not be received as cash, but only by the bank as an agent for collection, then the title to the draft did not pass to the bank, and the jury should find for the plaintiff. Checks or drafts deposited or credited, if intended to be for collection only, do not become the property of the bank, even if the depositor has been allowed to check against the deposit before the paper is collected.'"

This doctrine would seem to be sound. Under it each case stands on its own footing. In most cases, however, the result will be that pending collection title will be in the depositor. This for the reason that most banks to-day have a provision that paper is received for collection only, as is the case in the next case but one. This it would seem would show an intent to have title remain in the depositor until collection.

See Decision No. 1470.

Banks and Banking: Deposits: Trust Funds.

We have seen in the preceding note that money deposited in a bank becomes the property of the bank. The relationship between the bank and its depositor is that of debtor and creditor. A check is a mere order on the debtor to pay out a part or the whole of the debt, and it does not of itself constitute an assignment of the deposit unless accepted by the bank. This is so because in the eyes of the law there is no deposit at all but merely a debt. This is the well-settled law, and it is again so laid down in Allen v. Puritan Trust Co., Decision No. 1471, where the court says:

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"But while the money deposited could be disposed of by the company subject only to the obligation to pay an equivalent sum on demand, or to his order, the checks of the depositor would not transfer the debt, or title to the debt to the payee without the defendant's consent."

The relation of debtor and creditor, however, which exists between a bank and its depositor is of a peculiar nature. It is, so far as the bank is concerned, impressed with a quasi-trust. Hence, if the deposit is made by one acting in a fiduciary capacity and if the bank has notice of this, it may not pay out in violation of the trust. Therefore, if a deposit is made by one as administrator, trustee, etc., the bank at its peril pays out funds to the individual use of the depositor. If as a matter of fact he is entitled to the money so paid as fees, expenses, etc., the bank is protected. If on the other hand he is not so entitled, the bank is still liable to the trust fund for the amount so paid. So it is held in Decision No. 1471, where the court says:

"The personal property of the estate was held by him in a fiduciary capacity, and the source and nature of the respective accounts were fully disclosed by the contract. Robins v. Hope, 57 Cal. 493, 497; Hayes v. Hall, 188 Mass. 510, 511, 74 N. E. 935; J. G. Brill Co. v. Norton & Taunton Street Railway, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; Quinn v. Burton, 195 Mass. 277, 279, 81 N. E. 257. And in the discharge of their several duties, which were fully detailed by the master, the officers and agents of the defendant were charged with knowledge of the scope and effect of the various entries relating to the deposit as shown on the defendant's books. Foster v. Essex Bank, 17 Mass. 479, 489, 9 Am. Dec. 168; Elliott v. Worcester Trust Co., 189 Mass. 542, 545, 75 N. E. 944; East Hartford v. American National Bank, 49 Conn. 539; Bundy v. Monticello, 84 Ind. 119; American Exchange National Bank v. Loretta Gold & Silver Mining Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; Cutler v. American Exchange National Bank, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328; Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142; Bodenham v. Hoskyns, 2 De G. M. & G. 903; Pennell v. Deffell, 4 De G. M. & G. 372; Bailey v. Finch, L. R. 7 Q. B. 34 If the primary relation was that of debtor and creditor, nevertheless on the face of a specific contract the money belonged to the estate, and the defendant must be held to have known that if the administrator appropriated it to his own use the appropriation would be a breach of his trust Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; McCarthy v. Provident Institution for Savings, 159 Mass. 527, 34 N. E. 1073; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Central National Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. The money due to the defendant for overdrafts was paid with its knowledge and consent by checks drawn on the administrator's account, which were in excess of the debt, and were correspondingly credited in his private account. If, as the defendant urges, the legal title to the personal property of the estate was in the administrator, the beneficial interest was in the heirs of

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the intestate, who not only could demand, but could enforce an accounting. Rev. Laws, c. 150; Bard v. Wood, 3 Metc. 74; Choate v. Jacobs, 136 Mass. 297; Silsby v. Young, 3 Cranch 249, 2 L. Ed. 429. And the nature of the fund was not changed by its having been diverted, and placed to the personal credit of the administrator."

See Decision No. 1471.

Banks and Banking: Deposits: Collection.

There is and has been much dispute between the courts of the various States as to a bank's responsibility for its correspondents to which it forwards paper for collection. One view holds that the correspondent is the agent of the forwarding bank, and that, therefore, the forwarder is absolutely responsible for any default on the part of the correspondent. The other view holds that the forwarding bank is only liable for due care in the selection of proper and responsible correspondents and that, once it has exercised such care, it is free from liability for the default of the correspondent. For example: A. deposits in the Y. bank a check drawn on the X. bank. The Y. bank forwards it to its correspondent, the Z. bank, for collection. The Z. bank delays presentation unduly and in the meantime the X. bank fails. Under the former view the Y. bank is absolutely liable for the negligence of the Z. bank. Under the latter view the Y. bank is liable only if it has been guilty of negligence in selecting the Z. bank as its correspondent. This latter view is probably supported by the weight of authority, and it is the one adopted by the Court of Appeals of Kentucky in Falls City Woolen Mills v. Louisville National Banking Co., Decision No. 1472, where it is said:

"In Farmer's Bank v. Newland, 97 Ky. 464, 31 S. W. 38, 17 Ky. Law Rep. 329, it was held that, where a customer deposits with a bank a check or bill for collection at a point distant from the location of the bank, he does so with the implied understanding that the bank will follow the customary method in making such collection, and can only be held responsible for due care and diligence in the selection of the correspondent who is to make the collection. There is neither pleading nor proof to show that there was any negligence on the part of the bank in selecting the Tishomingo Savings Institution. On the contrary, the undisputed evidence is to the effect that it stood high and was to all appearances a proper correspondent for the purpose. The plaintiff rests its right to recovery upon the sole ground that the bank did not take the check for collection but bought it."

See Decision No. 1472.

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Bills and Notes: Attorney's Fees: Negotiable Instruments Act.

On more than one occasion in the past we have considered the effect of a provision in a note for the payment of attorney's fees upon default. We have seen that some States uphold both the provision and the negotiability of the instrument in which it is incorporated, while other States, though upholding the provision, have held that it destroys the negotiability of the instrument. We have further seen that the Negotiable Instruments Act seemed to settle the dispute by providing that the stipulation for attorney's fees does not destroy negotiability. The late Ohio case, however, of Miller v. Kyle, Decision No. 1473, imports a new element of uncertainty into this seemingly settled question. It appears that in Ohio, before the enactment of the Negotiable Instruments Act, a provision for attorney's fees on default was void as an evasion of the usury laws. As has been said the act provides that such a provision will not impair negotiability. The court reasons that this was not meant to change the common-law rule in Ohio. That, therefore, the provision as to attorney's fees was still invalid notwithstanding the enactment of the act. Therefore, the act meant that the note would still be negotiable despite the invalid provision. The effect therefore, is to strike out the attorney's fees clause as though it had never been in the note and to enforce the note as a negotiable instrument with the objectionable clause eliminated. Said the court:

"In this State it has been firmly established, and long and constantly maintained, that such contracts for the payment of counsel fees upon default in payment of a debt will not be enforced. In State, for the Use of the Commissioners, v. Taylor et al., 10 Ohio 378, that conclusion was reached, and it was said that the enforcement of such contracts would result in evasions of the usury laws. The same conclusion was reached in Shelton et al. v. Gill et al., 11 Ohio 417, in Martin v. Trustees, 13 Ohio 250, and in Leavans v. Bank, 50 Ohio St. 591, 34 N. E. 1089. In all of these cases the contracts were denounced as contrary to public policy. The conclusion is well sustained by the obvious tendency of such contracts to encourage suits.

"Counsel for the plaintiffs admit the authority of these cases and their effect to establish the common-law rule of this State as contrary to the view upon which they insist, but they assert that that rule has now been abrogated by sections 8106 and 8107 of the General Code, which were enacted as sections 3171 and 3171a of an act entitled 'An act to establish a law uniform with the laws of other States on negotiable instruments,' passed April 17, 1902. 95 O. L. 162. The former of these sections prescribes the requisites for a negotiable instrument, among which requisites is that the instrument 'must contain an unconditional promise or order to pay a sum certain in money.' The latter relates to the required certainty, and it provides that 'the sum payable is a sum certain within the meaning of this chapter, although it is to be paid: . . . (5) With costs of collection or an attorney's

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fee in case payment shall not be made at maturity.' These sections will be at once recognized as a part of the Negotiable Instruments Act recently enacted, with but slight differences, in many of the States.

"Counsel for the plaintiff assert with confidence, and no one seems to doubt, that the General Assembly may by legislative enactment change the common-law policy of the State with respect to a subject of the character of this. Proceeding with the contention that the legislature of this State has exercised that power by enacting the sections referred to, they call attention to the wide diversity of decisions in the different States respecting the validity of such stipulations for the payment of attorney fees, and suggest that if there had been no intention to change the law of this State upon that subject the fifth paragraph of section 8107 would have been omitted. A diversity of decision to which that paragraph has obvious reference was not with respect to the validity of stipulations for the payment of attorney fees, but whether the insertion of such a stipulation in an instrument destroyed its negotiable character. One writer on the subject of the act says: 'The courts in the various States have been nearly evenly divided on the question of the negotiability of instruments with such provisions." Selover, pp. 59, 60. We are not advised that any court of this State has ever been called upon to determine that question. But whether, by the common law of the State, a stipulation for the payment of attorney fees destroyed the negotiable character of an instrument in which it was incorporated, or whether that question was undetermined, there was, in either case, an important purpose to be accomplished by the fifth paragraph of the section, without assuming that it was intended to give validity to stipulations which were previously invalid. To preserve the negotiable character of an instrument notwithstanding the incorporation of a stipulation for the payment of attorney fees the language of the section is entirely appropriate. It contains no language indicative of an intention to change the rule of the common law with respect to the validity of the stipulation.

"It is suggested that the General Assembly must be presumed to know the common law of the State, and that every section of a statute should be regarded as evincing an intention to change it. That would, indeed, be a novel rule of interpretation, and in the days of the codifer it would reach results most confounding. Its impracticability as a rule of interpretation will at once appear, if an attempt be made to apply it to the act of which these two sections form a part. That act has been in force in this State for more than nine years, and to the present time our attention has been called to but one respect in which it changes the common law of the State upon the subject of negotiable instruments. Quite different from the rule suggested is the rule which the wisdom of generations has established: That statutes in derogation of the common law shall not by construction receive a meaning beyond that of the terms which they employ. Certainly this does not mean that such statutes are to be construed in a spirit of hostility, but in its application to the present case it cannot mean less than that the legislative act, which contains language appropriate only to saving the negotiable character of instruments which contain stipulations for the payment of attorney fees, should not be construed to impart validity to such stipulations, notwithstanding an established rule of the common law to the contrary. It seems to be conclusive

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of this subject that if, seeking uniformity upon a subject not suggested by the terms of the statute, we should adopt the view urged by counsel for the plaintiffs, the desired result would not be attained; for in some of the States there has been added to the clause which constitutes the fifth paragraph of section 8107 in our statute the express provision that it shall not be so construed as to give validity to stipulations for the payment of attorney fees."

See Decision No. 1473.

Bills and Notes: Demand Notes: Maturity.

Hitherto that anamolous rule of law, that a demand note is due from delivery and not from demand, has been considered. We have criticized this rule and termed it illogical and unreasonable. Our opinion finds support in the stradling and quibbling of the courts made necessary by this holding. Having decided that a demand note is due at once, it was not long before the courts were called upon to consider when it had reached maturity, in other words, when it was overdue, so that one taking it thereafter would not be a holder in due course. To follow out the logic of the sage decision that a demand note was due at once, it should have been held that it was overdue immediately thereafter. This, however, would amount to declaring that a demand note could never be negotiable, since one could never be a holder before maturity and could, therefore, never be a holder in due course. The courts have not been willing to go thus far and they have cut the Gordian knot by holding that while a demand note is *due* at once it is not *overdue* until a reasonable time thereafter. So holds the case of Kerby v. Wade, Decision No. 1474, the court saying:

"'It now seems to be definitely settled, at least in this country,' says Mr. Tiedeman, 'that demand paper is overdue if it remains unpaid for an unreasonable time after its date, or the date of delivery.' Tiedeman on Bills and Notes, § 108. See also Daniel & Douglass, Elements of the Law of Negotiable Instruments, § 240, citing 1 Parsons on Notes and Bills, §§ 263, 264."

See Decision No. 1474.

Bills and Notes: Indorsement.

No item, perhaps, in all the law of negotiable instruments has been more frequently considered than the question of indorsement. What constitutes an indorsement is indicated by its name, is known to all by practical use and calls for no elaboration at this time. The liabilities arising from an indorsement are also fairly well understood and

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defined as are also its functions as a transfer of the instrument itself. One feature, however, of an indorsement is not so well understood and is emphasized in the late case of Hawkins v. Shields, Decision No. 1475. As between the immediate parties to an indorsement, i. e., the party indorsing and the one to whom he hands the instrument, the indorsement constitutes a new contract entirely. Between themselves this contract may be entirely different from the original one embodied in the note, though of course as to other parties they are nevertheless bound by the original contract and the rules which the law has engrafted thereon. So this case holds, saying:

"The indorsement of a bill or note is not merely a transfer thereof; but it is a fresh and substantive contract, embodying all of the terms of the instrument in itself. The indorsement of a bill is equivalent to the drawing of a new bill by the indorser upon the drawee in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee. So entirely distinct and independent is the contract of an indorser of a note thereof and the maker that at common law a separate action against each was indispensable. The indorser engages that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditioned upon due presentment of demand and notice. It also engages that it is in every respect genuine, that it is the valid instrument it purports to be, that the ostensible parties are competent, and that he has the lawful title to it and the right to indorse it. Such is the nature and effect of the contract of indorsement as shown by all of the authorities."

As a consequence thereof it follows, that an instrument may be transferred as between the parties by indorsement even after maturity. The only difference in such case is that, whereas if transferred before maturity it must be presented even as between the parties at maturity, if transferred after maturity it need only be presented within a reasonable time. Decision No. 1475 also holds this in these words:

"As between the indorser and indorsee there is no difference in the contract of indorsement, so far as the rights and liabilities of the indorser are concerned, when the indorsement is made before and when made after maturity; the only difference being that, when the indorsement is made before the maturity of the bill or note, the time of payment is fixed by the terms of the instrument itself, but when the indorsement is made after maturity, payment must be demanded of the payor within a reasonable time and notice, in the event of a refusal, given to the indorser in order to charge him. In such an instance the instrument is regarded as being equivalent to one payable on demand. Daniel on Negotiable Instruments (5th ed.), §§ 611, and authorities cited in notes; 7 Cyc. 822 et seq.; Baskerville & Whitfield v. Harris, 41 Miss. 535."

See Decision No. 1475.

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Bills and Notes: Transfer of Title by Holder in Due Course: Payment Without Production of Note.

A holder in due course of a negotiable instrument takes the same free from all defenses which might have existed between the prior parties against each other. This is elementary. This protection of the bona fide holder is so complete in the law that he may even transfer his good title to one who because of notice, etc., could not in the first instance have become a bona fide holder himself. This is founded on the principle that an owner can always give as good a title as he possesses. The purchaser stands in the shoes of the prior owner. This is necessary to the protection of the bona fide holder since otherwise his market for the paper would be much narrowed. John Smith obtains a promissory note made to his own order by fraud from Jones. Smith cannot enforce this against Jones. If Smith, however, indorses the note over to Brown who takes for value, before maturity and without notice of the fraud, Brown may enforce it against Jones notwithstanding the fraud. Furthermore Brown may even transfer the note thereafter to Robinson who knew of the fraud but was not a party to it, and Robinson may enforce the note against Jones on the strength of succeeding to Brown's rights as a bona fide holder. There is but one qualification of this. The party seeking to enforce the note must not have been a party to the original fraud. In the example suggested Smith could not under any circumstances enforce the note against Jones. A contrary rule would cause the courts to enforce a fraudulent contract for the benefit of the defrauder. The doctrine we have been discussing is laid down in Miles v. Dodson, Decision No. 1476, where the court says:

"It is urged by counsel for defendants that the plaintiff purchased the note from the bank in February, 1905, which was after its maturity, and, on that account, was not an innocent purchaser thereof, but took it subject to all defenses that the makers had against the original payee, Smith, and they cite to sustain this contention Nisbitt v. Brown & Norton, 30 Ark. 590, and Sorrels v. McHenry, 38 Ark. 127. But under the facts of this case we do not think that the makers can resist the payment of this note by any defense which they might interpose to it in the hands of the original payee, even if it should be held that the plaintiff obtained the note from the bank after its maturity. The note had been transferred by the payee, Smith, to Dodson & Son in August, 1903, long prior to its maturity. If Dodson & Son were at that time holders thereof for value in the due course of business, then any subsequent purchaser thereof from them, even though he obtained it after maturity, would be protected against any defense which the makers might have or be entitled to assert against the original payee. As is said in 1 Daniel on Negotiable Instruments, p. 801: 'As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is

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established; and the power of transferring it to others with the same immunity which attaches in his own hands is incident to his legal right and necessary to sustain the character and value of the instrument and to protect the bona fide holder in its enjoyment.' And the author further says: 'If the holder acquired the paper after maturity from one who became a bona fide holder for value and without notice before maturity, he is then protected by the strength of his transferror's title.' 1 Daniel on Negotiable Instruments, p. 776; Woodman v. Churchhill, 52 Me. 58; Hogan v. Moore, 48 Ga. 156. See also note to Y. M. C. A. Gym. Co. v. Rockford Nat. Bank, 46 L. R. A. 784."

This case also draws attention to the fact that one is not safe in paying a note unless the original note is produced and delivered. If he does and the original note thereafter turns up in the hands of a bona fide holder in due course he will be obliged to pay twice. The court says:

"The note was constantly, after its assignment by Smith, the payee, in the hands of a holder who had acquired an interest in it, and such holder was alone entitled to the payment of it. After such transfer by the payee, the maker was not authorized to pay same to the payee of the note. He could only make a valid payment to the holder of the note, and if he made a payment to one who at the time was not the holder of it, he did so at his own risk."

See Decision No. 1476.

Bills and Notes: Cancellation: Accord and Satisfaction; Consideration.

A contract cannot be canceled nor can the obligations of any of the parties thereto be altered or impaired without the assent of all the parties. This rule is founded on the very essence and nature of the contractual relation and applies to all contracts of all classes. Hence it applies to negotiable instruments. So it was held and applied in Foster County State Bank v. Lammers, Decision No. 1477, where one of the several joint makers of a note after its delivery drew an ink line through the signatures of three of the other joint makers. This was done without the knowledge or assent of the payee, and it was accordingly held that the act was a nullity having absolutely no effect on the instrument which could be enforced to its full extent as though the lines had never been drawn. The court said:

"There is no merit in the claim that the note was canceled. One of the defendants drew pen and ink lines through the signatures of three of the defendants, but the evidence is conclusive that this was done without the knowledge or consent of the payee."

It was also held in this same case, in line with what we have hitherto seen, that an attempted accord and satisfaction of an undisputed debt by the mere payment of a lesser sum is of no avail, as there is in such case no consideration for the satisfaction. We quote from the opinion of the court:

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"The trial court, in excluding the evidence offered and in directing a verdict, applied the rule that where the amount of a debt is undisputed the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire indebtedness, is not a satisfaction, and that such an agreement is not enforceable, because without consideration. It is, of course, clear that each defendant was liable to plaintiff for the full amount of the debt, and therefore that the agreement to release him from liability for the balance due would be an agreement to discharge an undisputed debt by the payment and receipt of a sum less than the whole.

"Defendants urge that this rule should be repudiated by this court, and point to many forcible decisions in which the rule has been condemned as absurd, unjust, unreasonable, and false in principle. But there can be no doubt that the great weight of authority sustains the rule, and it is too well established in a long line of decisions of this court to justify us in repudiating it at this late day. Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Ness v. Minnesota & Colorado Co., 87 Minn. 413, 92 N. W. 333; Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100; Demeules v. Jewel Tea Co., 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; First State Bank v. Schatz, 104 Minn. 425, 116 N. W. 917; Allen v. Batz, 133 N. W. 79.

"Defendants contend that a consideration for plaintiff's agreement is found in the fact that defendants agreed to make the payments in Stillwater, Minn., instead of Carrington, N. D., and that therefore the case falls within a well-established exception to the rule. It is true that an agreement by the debtor, made before the maturity of the note, to pay at a place other than the place specified in the note, or at another time, is deemed a sufficient consideration for an agreement by the creditor to accept a sum less than the whole in full payment. But clearly this consideration is lacking when the note is past due. Before maturity the creditor cannot compel payment at any other time or place than those named in the note, but after maturity he is legally entitled to collect his debt wherever and whenever the debtor is found. The agreement to make the payment at Stillwater was, therefore, no more than defendants were legally bound to do, and was in fact a convenience to defendants, rather than a burden, and a loss to plaintiff, rather than an advantage."

See Decision No. 1477.

Bills and Notes: Accommodation Parties.

An accommodation party to a negotiable instrument is one who signs the instrument for the purpose of helping the maker or holder by adding credit thereto without receiving for himself any advantage or consideration therefrom. If A. desires a bank to discount his note and the bank refuses unless A. procures a responsible indorser and A. procures B. as a favor to him to indorse the note, B. is an accommodation indorser. As to all parties dealing with a note the liability of

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an accommodation party is the same as it would have been had he not been an accommodation party. To this there is one exception: the party accommodated can never enforce the note as against the accommodator. In the case suggested above, if B. instead of indorsing had signed a note to A.'s order for A.'s accommodation, A. although nominally payee could never enforce the note against B. This rule was applied in Peterson v. Tillinghast, Decision No. 1478, and a maker was held to be an accommodation party and, therefore, relieved from liability as against the party accommodated on the following state of facts:

"The controversy in that case had its origin in a complaint of a bank examiner of excessive loans made by the Guthrie Bank (Oklahoma Territory). The Guthrie Bank, through its president Billingsley, entered into an arrangement with the City Bank (Kansas City) under which the City Bank accepted a note in its favor for $30,000 signed by Billingsley, and opened on its books a special account for that amount in the name of the Guthrie Bank. The City Bank had been advised of the purpose of this transaction by letter from Billingsley stating (208 U. S. 542, 28 Sup. Ct. 347, 52 L. Ed. 610): 'My reason for wanting this is that I have that amount of excessive loans that the department is kicking about. . . . You will not be out any money and loan and deposit will offset each other on your books.' The Guthrie Bank had a general deposit with the City Bank, but it was agreed that the Guthrie Bank should not check against the special deposit account; the arrangement was characterized by Mr. Justice Holmes as 'a scheme for a separate paper transaction.' Billingsley subsequently sent a letter, with his note, to the City Bank stating that he had given the Guthrie Bank his check on the City Bank for the amount of the note, and that the Guthrie Bank would keep the $30,000 with the City Bank until the note was retired. In short, the scheme was carried into execution in the Guthrie Bank and in a manner in some respects not known to the City Bank. The three objectionable notes were taken out of the Guthrie Bank's assets and possession. The $30,000 note fell due and another loan for a less sum ($25,000) was, like the first note, credited in the special account to the Guthrie Bank under the same arrangement. The Guthrie Bank failed and its receiver notified the City Bank that the note was not a liability of the Guthrie Bank, and that the City Bank would be held; and suit was brought to recover the amount of the apparent special deposit. The City Bank, having no knowledge of the Guthrie's Bank failing condition, on the day of the failure charged the note to the special account and returned the note duly canceled, closing the account.'

See Decision No. 1478.

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Carriers: Degree of Care: Negligence.

Carriers of passengers as distinguished from carriers of goods are held liable for the highest degree of care that human foresight can suggest for the safety of their passengers. This applies to street railways as well as to steam railways. So it is held in Louisville & S. I. Traction Co. v. Walker, Decision No. 1479, where it is said:

"Involved in the action of the court in overruling appellant's motion for a new trial is the contention that the evidence fails to establish negligence on the part of appellant, and that it does show that appellee was guilty of contributory negligence. There is an earnest controversy between counsel for the opposing parties as to the degree of care by which appellant's duty to appellee should be measured. The rule which requires a carrier of passengers to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its road, and which is generally applied to the actual progress of the passenger on the journey undertaken, applies to street railroads."

Such carriers also owe a duty to those about to board their trains and those departing therefrom. Their duty in this case is to supply reasonably safe means of ingress and egress. The measure of care in these circumstances would seem to be ordinary care only. The case we are considering touches on this point, saying:

"But it is contended by counsel for appellant that this rule is not the proper one to gauge the duty of appellant, under the facts in this case, but, on the contrary, that the rule which requires only ordinary care of railroad carriers, in providing and maintaining safe and convenient places for the ingress and egress of passengers to and from their trains at regular stopping places, should apply."

It is to be noted, however, that this rule is not inflexible, and where a carrier is a street railway whose cars people board from the street, a different and more stringent rule may be applied if the streets have been put into an unsafe condition by the carrier itself. So this case holds:

"There are obvious reasons why the care to be exacted from appellant, under the circumstances of this case, should not be narrowly limited by this latter rule. The circumstances and conditions which produced appellee's injury in this case are more complex than those which usually admit an application of it. The obstruction of the street by the work cars, which stopped the car on which appellee was a passenger at an unusual place in the middle of a square, the condition of the disembarking place, the compulsion under which appellee's journey was interrupted, and she was required to leave the car at an unusual and unfit place, were all brought about by appellant."

As will be seen from this there can be no exact measure of what will constitute negligence. The standard varies with all the facts and

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circumstances of each case, and what might constitute negligence under one set of circumstances might be due care under another. As the court says:

"But ordinary care ebbs and flows with the danger to be fairly anticipated by a man of reasonable prudence from the circumstances and conditions involved in each case. Where the danger indicated is small, ordinary precaution and care required to avert it are not great. Where the danger to be anticipated is great, ordinary care may call for the highest vigilance, activity, and unremitting attention to guard against it."

See Decision No. 1479.

Carriers: Interstate Commerce: Connecting Carriers: Presumption of Liability.

We have hitherto drawn attention to the dispute that existed at common law as to the liability of a carrier receiving goods for shipment beyond its own line for injury happening to the goods while under the control of a connecting caririer. The New York doctrine, so-called, held that the initial carrier merely undertook to carry to the end of its own line and there to deliver to the connecting carrier. Under this view a carrier's responsibility ended with his getting rid of the goods, and each carrier was responsible for injury to the goods while in his control, but not otherwise. The federal doctrine, so-called, considered the initial carrier as contracting for the whole route. The connecting carriers under this view were merely agents of the initial carrier and the latter was, therefore, liable for any injury to the goods no matter on which line the injury occurred. This view had all the convenience, justice, and most of the logic on its side, and by the Carmack amendment to the Interstate Commerce Act it was applied to all shipments coming under interstate commerce. In the late case of Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, Decision No. 1480, the United States Supreme Court upholds this enactment, saying:

"Under the Carmack amendment, as already constructed in the Riverside Mills case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad."

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As a necessary corollary of this doctrine it follows that on proof of delivery to the initial carrier and of nondelivery to the consignee there arises without further proof a presumption — subject of course to be rebutted — of the initial carrier's responsibility. So this case holds. The court said:

"Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof the plaintiffs were entitled to recover, and the judgment is affirmed."

See Decision No. 1480.

Chattel Mortgages: Sales: Contract to Sell.

A sale contemplates an object to be sold. To have a present sale of property the property must be in existence and be ascertained. You are no more able to sell property not in existence than you are to repair a house not yet built. It is different with a contract to sell. A contract to sell is an agreement to sell some object in the future. It is valid even though the property be not in existence at the time, but it cannot be consummated in a sale until the property is in actual existence. A sale gives you a right to the property. A contract to sell merely gives a claim against the other party. If B. sells B.'s horse to A., the latter can get the horse from any one who thereafter gets it from B. On the other hand, if B. contracts to sell to A. his horse one month hence, B. in the meantime may give a good title to the horse to C. and all A. has is his right of action for damages against B. for his breach of contract to sell.

In certain cases the law recognizes a "potential existence" of an object which makes it capable of being the subject of a present sale. A crop planted but not grown may be sold. So may the young of an animal conceived but not yet born. In both of these cases the object sold is actually in existence but not in its final form.

All of this may be applied with little change to chattel mortgages, which in contemplation of law are merely conditional sales.

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Swint v. State, Decision No. 1481, would seem to hold that the unborn and unconceived progeny of animals may be sold. If it does decide this it goes too far. The court says:

"The progeny of mortgaged animals, born after the making of the mortgage, becomes subject to the lien created by the mortgage; and the court properly admitted evidence as to the calves born to the mortgaged cows."

See Decision No. 1481.

Contracts: Duress: Ratification.

At common law a contract executed under duress was voidable. Duress, however, was defined as compulsion under fear of death or grievous bodily injury to one's self or to one's immediate family. For many years this definition was strictly enforced and no other duress was recognized. Gradually, however, under the influence of equity any influence which so far overpowered the mind of a person that he actually acted against his will has come to be held in most jurisdictions to constitute duress sufficient to avoid any contract entered into under such influence. It will appear that under this rule the question is largely one of fact rather than of law. The following quotation from Brown v. Worthington, Decision No. 1482, is an excellent summing up of the development of the law on this subject:

"Originally 'duress' meant only duress of the person, and nothing short of such duress amounting to a reasonable apprehension of imminent danger to life, limb, or liberty was sufficient to enable the party to recover back the money paid. Subsequently, in keeping with the principles of equity and good morals, the doctrine was extended so as to recognize duress of property as a sort of moral duress which might equally with the duress of the person entitle the party to recover back money paid under its influence. While this view prevailed, some of the cases asserted the doctrine that, unless it appeared the money was paid to release the person or property of the payer from detention or to prevent a seizure of either by one having apparent authority in that behalf, a recovery was not to be allowed.

But, though such were the former rules of decision, the modern authorities go farther, and generally declare that such pressure or constraint as compels a man to go against his will virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another constitutes duress, irrespective of the manifestation or apprehension of force. Under this view, it is said the real and ultimate fact to be determined in every case is whether or not the party paying the money really had a choice; that is, whether he had his freedom of exercising his will. Numerous authorities declare that, if one is compelled by business necessity to surrender to the constraint involved in the unlawful demand and make the payment, moral duress appears. In other words, in such circumstances, it may be found as a fact that the party paying has not had his freedom of exer-

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cising his will and paid the money under moral duress, in which event, if it is against equity and good conscience for the money to be withheld from plaintiff, it may be recovered. Such is the undoubted rule of decision in this State as will appear by reference to the following authorities: Niedermeyer v. Curators of State University, 61 Mo. App. 654; Fout v. Giraldin, 64 Mo. App. 165; Wells v. Adams, 88 Mo. App. 215; Am. Brewing Co. v. St. Louis, 187 Mo. 367, 377, 86 S. W. 129; Westlake v. St. Louis, 77 Mo. 47, 46 Am. Rep. 4. See also 30 Cyc. 1303, 1304, 1305.

"Here it appears plaintiff was obligated under a written contract to deliver 1,000 head of the hogs on Chesley Island to McPherson, and that McPherson came from Omaha to St. Louis to receive them on the very day the $1,500 was so unlawfully exacted. Plaintiff parleyed with defendant over the matter, and the only alternative to paying the money was to breach his contract with McPherson. Certainly such constitutes, not only a business necessity, but an urgent one, which tends to show that plaintiff did not have the free exercise of his will in the matter. Furthermore, the precepts of equity and good conscience suggest that money so obtained is wrongfully withheld from, and should be returned to, plaintiff. But, though such be true, plaintiff's first instruction is erroneous, in that it omitted to submit the question as to whether or not he had the free exercise of his will or was constrained by the business necessity revealed to pay the money; that is give the check and execute his note to defendant.

"This instruction hypothesizes the facts of the case very well, but it seems to assume as a matter of law that, if those facts were found to be true, then moral duress appeared. Such is not true unless the jury believed those facts and circumstances cast a restraint upon plaintiff sufficient to overcome the will of a person of ordinary firmness so as to destroy his free moral agency. See authorities, supra."

It is to be noted that duress does not avoid the contract absolutely but merely renders it voidable at the option of the person coerced. He may either ratify and enforce it — under the principles governing ratification heretofore discussed — or he may disaffirm it, and either have it declared void or resist enforcement of the same. On this point the court in Brown v. Worthington says:

"There can be no doubt that a contract made under duress is not absolutely void, but voidable only; and, this being true, it is susceptible of ratification so as to render it entirely valid thereafter. Thus, if a person having been constrained by duress to make a contract afterward voluntarily acts upon it or in any way affirms its validity, he thereby precludes himself from afterward avoiding it. 9 Cyc. 443; Ferarri v. Board of Health, 24 Fla. 390, 5 South. 1; Sornborger v. Sanford, 34 Neb. 498, 52 N. W. 368. Because of this, it is said, though plaintiff was constrained to give his check and execute the note under duress practiced upon him by defendant on July 30th, he is not entitled to recover for the reason it appears that his personal check was promptly paid by his bank on presentment without a countermand from him and that he paid the note at maturity, thirty days thereafter, without objection, and this, too, when no duress whatever obtained.

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In other words, it is said, though duress obtained at the time the note and check were given, the transaction was subsequently ratified through payment made at a time when no duress appeared whatever. This matter pertaining to a ratification and as to whether or not duress continues until the payment was made was not submitted to the jury, and we believe it should have been, for the evidence warranted a finding of fact thereon. As we understand the record, the proof is by no means conclusive that plaintiff ratified the transaction by the subsequent payment of the check and note without objection when no restraint touching the exercise of his free will concerning the same appeared."

See Decision No. 1482.

Contracts: Building Contracts: Architect's Certificates.

Most building contracts to-day provide that the certificate of the architect as to completion shall be a condition precedent to payment. The effect of this provision has been the cause of much dispute. Some courts hold that so long as the building is completed substantially in accordance with the contract, the builder may recover notwithstanding the absence of the architect's certifiate. Other States more logically stick to the terms of the contract and hold that in such a case the builder must produce his architect's certificate or he cannot recover, and the certificate produced must be that of the architect named and not of any other or others. The only exception to this rule is where it can be shown that the architect has been guilty of fraud or bad faith. In such case the builder may recover without his certificate though the burden of proving such fraud is upon him.

New York has always stoutly maintained the latter doctrine and reiterates it in the case of A. D. Granger Co. v. Brown Ketcham Iron Works, Decision No. 1483, where the court said:

"The contract prescribed a condition precedent, to wit, a written acceptance of the vault linings by the architect of the Essex county courthouse, to entitle the plaintiff to payment therefor. No such written acceptance had been given up to the time of the commencement of the action. When the suit was begun, therefore, the plaintiff's case was fatally defective in an element essential to make out a cause of action under the contract. The contract did not obligate the defendant to pay until the written acceptance had been obtained; consequently there was no obligation to pay when the action was commenced."

See Decision No. 1483.

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Corporations: Foreign Corporations.

That a corporation is a legal person, an entity existing separate and distinct from its stockholders, has frequently been explained by us. This existence is created by the State, and without the consent of the State no corporation can come into existence or continue to exist. Hence it comes that corporations in a peculiar and special manner are subject to State control and regulation. Of late years this is more true and the control exercised is broader than hitherto. It was originally held in the famous Dartmouth College case that the charter of a corporation constituted a contract between the State and the corporation, which was protected from revocation or amendment without the consent of the corporation by the provision of the Federal Constitution forbidding the passage of any law impairing the obligation of contracts. Since that decision it has been the policy and practice of all States to embody in all charters or in the laws under which charters are granted a provision that they are subject at all times to repeal or amendment by the State. This provision, of course, becomes part of the contract so that to-day the power of the State to amend or repeal is just as complete — except in the rare instance of a corporation formed before the decision in the Dartmouth College case — as if that decision had been "recalled." Such is the nature of a State's control over corporations formed by itself or by virtue of its own laws.

Its power over corporations of other States or of foreign countries is just as complete. It may prohibit their entrance within its borders or it may allow them to enter and do business on such terms as it sees fit to impose. In general the States do impose such terms which usually include the filing of a statement and the payment of a tax. The New York statute is a fair sample of these enactments, and the following quotation from Mahar v. Harrington Park Villa Sites, Decision No. 1484, discusses fully the terms and effect of the New York statute:

"The theory upon which the complaint has been upheld by the Appellate Division is that the contract therein mentioned was void, because made by a foreign stock corporation, other than a moneyed corporation, doing business in the State of New York in violation of the provision of section 15 of the general corporation law (Laws of 1909, c. 28 [Consol. Laws 1909, c. 23]); and hence that there was a failure of consideration for the payment of the $500 by the plaintiff, and an action lies to recover back the money. It is assumed in the prevailing opinion that this court held, in the case of Wood & Selick v. Ball, 190 N. Y. 217, 225, 83 N. E. 21, 23, that noncompliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this State absolutely void. Such is not my understanding of the purport of that decision. The only

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proposition decided in that case was 'that compliance with section 15 of the general corporation law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this State.' It is true that Judge Vann, in the course of the opinion, said that no such corporation could lawfully make contracts in this State without obtaining the required certificate in advance, and that he also spoke of contracts made by a corporation which had not obtained the certificate as 'unlawful,' and said that, in the absence of the certificate, a foreign stock corporation could not carry on business here, 'except in violation of law.' None of these expressions, however, necessarily imports that a contract thus made is absolutely void. The only penalty which the general corporation law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York. 'No foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State, unless prior to the making of such contract it shall have procured such certificate.' Cons. Laws, c. 23, § 15. This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but, in my opinion, it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York without the certificate of authority required by section 15 of the general corporation law is limited to that thus prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this State without having obtained the certificate; but it has not done so. This was the view taken in Alsing Co. v. New England Quartz & Spar Co., 66 App. Div. 473, 73 N. Y. Supp. 347, affirmed 174 N. Y. 536, 66 N. E. 1110, where it was held that section 15 did not prevent a foreign stock corporation doing business here without having procured the necessary certificate from recovering upon a counterclaim growing out of the transaction upon which the plaintiff sued. 'The defendant, having been brought into court and thus made to defend,' said Mr. Justice O'Brien in that case, 'should be allowed, unless there is a distinct provision to the contrary, not only to defend, but also to litigate any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such prohibitive provision in this statute; and therefore the obtaining of the certificate would not be a prerequisite to a recovery upon the counterclaim in question.' 66 App. Div. 476, 73 N. Y. Supp. 350.

"The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another State is not necessarily void because the corporation had not complied with the laws of such other State imposing conditions upon it as a prerequisite to the lawful transaction of business therein. In Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, a tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from purchasing or holding land in that State until it should acquire the right to do business therein by fulfilling certain prescribed conditions. Here the Missouri corporation had unques-

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tionably violated the laws of Colorado when it purchased the property without having previously designated its place of business and an agent, as required by the Colorado statute. The only penalty which that statute provided, however, for noncompliance with these provisions was that the officers, agents, and stockholders should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held the fair implication to be that, in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute, prescribing the terms upon which foreign corporations might do business in that State; and hence the judiciary ought not to inflict the additional and harsh penalty of forfeiting the estate which had been conveyed to the Missouri corporation. In other words, the court refused to treat the conveyance as void, notwithstanding that it was made to a corporation which was forbidden to receive it."

See Decision No. 1484.

Interstate Commerce: Employers' Liability.

No question in the realm of law and jurisprudence to-day is of more importance than the changes which are being advocated and discussed in the legal rules of liability of an employer for injuries received by an employee in the course of his work.

At common law the employer was not liable if the injury occurred from the negligence of a fellow servant, from the contributory negligence of the employee himself or under circumstances which would justify the conclusion that the employee knew and disregarded and, therefore, assumed the risk. Legislation has been aimed chiefly at these rules in the endeavor to broaden the field for recovery by the employee.

New York in the Ives case held the New York enactment unconstitutional as it went too far. The United States Supreme Court held the first federal act on the subject to be unconstitutional, but in the case of Mondou v. New York, New Haven & Hartford R. R. Co., Decision No. 1485, has upheld the latest enactment of Congress on the subject. The decision follows the reasoning of the Ives case although a different result is reached. It practically wipes out of the law the "fellow-servant" doctrine. It also abolishes where the master has been at all negligent the doctrines of contributory negligence and assumption of risk. The court said:

"Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person

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was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the empployee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives.

"Of the objection to these changes it is enough to observe:

"First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77, 87; Martin v. Pittsburg & L. E. R. Co., 203 U. S. 284, 294, 51 L. Ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 577, 22 L. Ed. 654, 662; Western U. Teleg. Co. v. Commercial Mill. Co., 218 U. S. 406, 417, 54 L. Ed. 1088, 31 Sup. Ct. Rep. 59.

"Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confined to it by the Constitution. Lottery Case (Champion v. Ames), 188 U. S. 321, 353, 355, 47 L. Ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 A. & E. Ann. Cas. 561; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 203, 55 L. Ed. 167, 181, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

"We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law operating uniformly in all the States, upon all carriers by railroad engaged in inter-state commerce, would better subserve the needs of that commerce."

See Decision No. 1485.

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Insurance: Insurable Interest: Assignment of Policy.

It has long been well settled that one cannot take out insurance on the life of another unless he have an interest in the life of the person insured. An insurable interest has been defined to be one that is of such nature that there is a reasonable expectancy of benefit from the continuance of the life of the one insured. Hence a wife may insure the life of her husband, an employee the life of his employer, a creditor the life of his debtor. If such an interest does not exist the whole policy is void. This is so held on the grounds of public policy, because the contrary view might encourage crime and because such contracts would be in the nature of gambling contracts.

Once, however, a valid policy is issued it may be assigned even to one who has no insurable interest in the life insured, and the assignee may enforce the policy according to its terms. A contrary view would greatly lessen the usefulness and value of life insurance policies. These doctrines were recently affirmed by the United States Supreme Court in Grigsby v. Russell, Decision No. 1486, where the court said:

"Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third premium *ad diem*, and that when Grisby paid, he was making a new contract. But a condition in a polcy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company. Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Oakes v. Manufacturers' F. & M. Ins. Co. 135 Mass. 248. The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, but

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also the principle of public policy referred to, at least, in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's case. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. Stat. 14 George III., c. 48.

"On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the bankruptcy law, § 70,[1] which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only (Godsall v. Boldero, 9 East 72), long has disappeared (Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501). And cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith."

See Decision No. 1486.

Insurance.

A most interesting question is presented in the case of Northwestern Mutual Life Insurance Co. v. McCue, Decision No. 1487. Where a policy merely insures against death, does it cover death by execution for a crime committed? The court reviews the authorities and on reasons of public policy and, despite the rule of strict construction of insurance policies against the insurer, holds that such a death is not covered by the policy, and that therefore there can be no recovery on the policy when death is so caused. The court said in part:

"Or, to put it more abstractly for the present purpose of our discussion, whether a policy of life insurance insures against death by a legal execution for crime.

"The question was before this court in Burt v. Union Cent. L. Ins. Co., 187 U. S. 362, 47 L. Ed. 216, 23 Sup. Ct. Rep. 139. In the policy passed on, as in the policy in the case at bar, there was no provision

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excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: 'Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?" And answering, after discussion, we said: 'It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." Cases were cited, among others Ritter v. Mutual L. Ins. Co., 169 U. S. 139, 42 L. Ed. 693, 18 Sup. Ct. Rep. 300. There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying that 'a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment.'

"These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications, and we pass by, therefore, the very interesting argument of counsel for respondents as to the indefinite and variable notions which may be entertained of such policy according to times and places and the temperaments of courts, and the danger of permitting its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts deliberately made."

See Decision No. 1487.

Insurance: Construction.

As we have intimated in the preceding note and discussed on more than one occasion in the past, courts construe insurance policies most favorably to the insured and against the insurer. This rule is reaffirmed in Mears Mining Company v. Maryland Casualty Company, Decision No. 1488, where the court says:

"This is an insurance contract, and is to be construed the same as other insurance contracts, to wit, most favorable to the assured."

A qualification, however, is attached to the rule in this case. Where a statute is penal in its nature it must be construed most strictly as against the penalty. When a penal statute, therefore, is to be con-

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strued, even though it affects an insurance policy should the penalty be aimed against the insurer, the statute must be construed strictly in favor of the insurer. So the court holds, saying:

"Another well-settled rule to be considered in construing the statute is that it is highly penal, and should not be held to apply to any company or class of insurance that is not plainly included by its provisions. It is apparent that without the general words the appellant's business is not included in the statute, and therefore, if it is subject to the provision of the statute, it is made so by the general words. It is equally apparent that the particular words do not exhaust the class, and therefore, if the general rule is not to be applied, it must be for some other reason.

" The statute expressly names three kinds of insurance, to wit, fire, life, and marine. These classes of insurance are common, and have been in general existence for such length of time 'that the memory of man runneth not to the contrary.' This statute was first enacted in 1865, and continued in force without material change until 1911, when the legislature amended it so as to expressly include indemnity contracts of insurance. At the time the statute was enacted, there were certain classes of insurance other than the ones expressly named therein, and it may well be said that it was such insurance that the legislature intended to cover by the general words. The words 'other insurance' may include windstorm or cyclone insurance, as such insurance would undoubtedly belong to the same class as fire insurance, as the loss would be the same, and of the same character, whether a man's house was burned or blown away.

" While it is not conclusive, it is to be considered in construing the statute that the character of insurance written by the defendant was not in existence at the time this statute was enacted. City of Carthage v. Carthage Light Co., 97 Mo. App. 20, 70 S. W. 936. In Breeden v. Insurance Co., 220 Mo. 3227, 119 S. W. 576, in speaking of this character of insurance, the court said: 'Indemnity insurance, as understood in this class of litigation, is of comparatively recent origin. After a careful investigation I have been unable to find any policy of that character antedating the year 1886.'"

See Decision No. 1488.

Interest.

In O'Shields v. Poff, Decision No. 1489, notes were made payable in one year with interest at the rate of eight per cent. per annum, "payable as it accrues." The question arose as to when such interest was due. The court held that "payable as it accrues" under the circumstances of the case meant "payable annually," saying:

" The first note the petition admitted had been paid. Note 2, according to the exhibit attached to the petition, was for $330, and matured 'on or before March 5, 1910, and monthly from March 5, 1910,' and was payable 'in the sum of $27.50 per month for twelve months from March 15, 1910.' It provided for interest from date

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February 5, 1909, until paid at the rate of eight per cent. per annum, the interest payable as it accrues. This suit was filed in the District Court on November 1, 1910. The allegations of the petition, when construed in the light of the exhibits attached, show that the suit was not prematurely brought. The body of the petition does not declare on a note maturing March 5, 1910, but it does contain allegations sufficient to indicate that such a note was one of the series and in the light of the exhibit, indorsed note No. 2, should be construed as a declaration on a note maturing March 5, 1910, 'and monthly thereafter,' the monthly payments of which amounted to $27.50. But aside from this the petition declares, and the notes show, that each of them bears interest from date at the rate of eight per cent. per annum, same payable as it accrues, and the petition further declares that the defendants have failed and refused to pay such interest, and the plaintiff elects, as he is authorized to do, to declare the entire indebtedness due. We construe the language relative to the interest 'as it accrues' to mean annually; that is, eight per cent. interest per annum. 'Payable as it accrues' means that the same is payable annually."

It would seem that the decision is correct. As a general thing interest will not run on a negotiable instrument until the due date has expired unless a provision for the payment of interest is inserted in the instrument, in which case it draws interest from the date of issuance. Even though it does thus draw interest from date the common usage of business men, which settles principal and interest at maturity, would seem to make the interest not due until maturity, although computed from date. This, of course, can be true only in the absence of any stipulation in the instrument to the contrary, and it is submitted that with this qualification the doctrine as here laid down is correct.

See Decision No. 1489.

Principal and Agent: Implied Authority: Written Contracts.

The nature of the relation of principal and agent together with many of the legal incidents thereto have been considered by us on several occasions in the past. Berberet v. Myers, Decision No. 1490, adds to what we have already seen the well-settled legal principle that an employment as an agent unless it be coupled with an interest is subject to revocation at any time by the principal who thereafter is not bound by any acts of the agent. This is so even where the revocation constitutes a breach of contract as between principal and agent. The court said:

"A naked contract of agency — that is, one not coupled with an interest — may be revoked by the principal, and, absent matter of estoppel, that revocation cuts away the agent's power to deal with third parties on the subject-matter of the agency. Whatever the

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rights between a principal and agent, inter sese, the right to revoke an unexecuted naked power cannot be called in question by third parties."

As we have hitherto seen, a grant of a power of agency carries with it a grant of all the usual powers incidental to the main power and the principal will be held bound just as firmly by the acts of his agent within the scope of this apparent or implied authority as by those within the scope of the express authority. So in Berberet v. Myers, the court held that one who had employed a broker to sell land was bound by the act of that broker in fixing the date for the conveyance, although no express authority to fix the date had been given. We quote the court:

"When a main power is granted, incidents essential or usual to the exercise of that power are also granted — the greater includes the less by necessary implication. Incidentia rei tacite sequuntur. But a substantial departure from both the express and implied power does not bind the principal. He can say when called on to perform: I did not agree to those terms. (Non hæc in fœdera veni.)

"Assuming said general propositions sound, how does the case stand? The contract of sale provides for the execution of a deed and delivery of possession on the first of the following March. The contract of agency says nothing about that. Counsel do not argue that particular provision is in excess of the power, and yet it is of more substance than any departure contended for. Evidently, to make a perfect contract, it was necessary to fix a time for the consummation of it. That time, to be reasonable, should be the usual time for the expiration of tenancies — the beginning of a cropping season. It is common knowledge that March 1st is such in this latitude. The main power to contract carried the power to fix a time, and defendants tacitly acquiesce in that view of it. The wisdom and necessity of exercising the implied power we have just considered is seen at a glance; for the land was rented and for rent, and if possession was to be given at any other time defendants stood to be ground by an upper and nether millstone. They would have to reckon with their present or prospective tenants as well as their vendees."

On the same grounds the court held the principal bound where the broker was authorized to sell for cash only, and he entered into a contract for the payment of a certain amount on the spot and the balance on the delivery of the deed. Said the court:

"But it is argued the power granted contemplated only *one* cash payment, whereas the sale contract provides for two — one to bind the bargain (to use a chimney corner phrase); the other at the time the deal was to be consummated. But is it so clear that it looked to only one payment, so long as the transaction was put on a cash basis at the moment of consummation? The agency contract provided that the agents should receive their commission 'out of the *first* money collected.' Did that provision not imply more than *one* collection of money? We think so.

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"But aside from that, the gist of the agency contract in the particular now up is that there should be no time payments after the deed passed and possession was given — that the transaction was cash. The owners wanted their shares cash in hand. They had the right to make their own terms in that respect, and they did so. If A. is to pay for B.'s property at the time deed and possession are delivered, to wit, on Thursday, and A. pays part Monday, part Tuesday, and part Wednesday, that arrangement results in a cash transaction on Thursday and meets the contract intendment. Q. E. D."

So also where the agent was authorized to contract for the sale of land by a "sufficient deed," a contract for the execution of a warranty deed was held within the scope of his authority, the court saying:

"The agency contract called for a 'satisfactory deed;' the sale contract called for 'a warranty deed;' it is argued that is a material departure from the power. We think otherwise. The word *satisfactory* relates to a person; it implies a mental state. What person? Whose mental state? It cannot be soundly argued that vendors were contracting to convey by a deed satisfactory to *themselves*. That would be a poor inducement to purchase and a stumbling-block in the way of a sale. It would tend to defeat the very office of the agency contract; hence is unthinkable. The purchasers have a vital interest in the form of the deed and the power contemplated that they were the ones to be satisfied. We are of opinion an agent, who has authority to contract for a satisfactory deed, has power to contract for a warranty deed. Warranty deeds are usual deeds; quitclaim deeds are exceptional. They are rarely taken where a full consideration is paid and a clear title is contracted for, as here; for they cut off covenants and are a red danger signal of equities behind."

A familiar rule of contracts and of evidence was also once more enunciated by the court in this case. Where the negotiations of parties are reduced to a writing intended to embody the whole agreement, neither party can go behind that document and give evidence of a different or additional, prior or contemporaneous agreement. This, of course, in the absence of fraud or mutual mistake. On this point the court said in part:

"We may be permitted with profit to present the language of Chief Justice Kent in Bebee et al. v. President, etc., of Bank of New York, 1 Johns. (N. Y.) loc. cit. 572, 3 Am. Dec. 353 — language approved by so eminent an authority as Broom (Broom, Legal Maxims [8th Eng. ed.], p. 517): 'It is a sound rule of evidence that you cannot alter, or substantially vary, the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries, and it cannot be too steadily supported by courts of justice. Expressum facit cessare tacitum; vox emissa volat; litera scripta manet — are law axioms in support of the rule. And law axioms are nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages. This rule prevails equally in a court of equity and a court of law; for, generally speaking, the rules

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of evidence are the same in both courts. If the words of a contract be intelligible, says Lord Chancellor Thurlow (Shelburne v. Inchiguin, 1 Bro. 341), there is no instance where parol proof has been admitted to give them a different sense. Where a deed is in writing, he observes, in another place (Jonham v. Child, 1 Bro. 93), it will admit of no contract which is not part of the deed. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, an agreement is, by *fraud or mistake*, made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule. But the allegation of fraud or mistake must be made in the bill, before evidence to those points can be received. Cripps v. Jee, 4 Bro. 472.'"

See Decision No. 1490.

Principal and Surety: Discharge of Surety.

As insurance contracts are construed liberally in favor of the insured and strictly against the insurer, so contracts of suretyship are construed strictly in favor of the surety. This is more especially so where the contract is gratuitous in so far as the surety is concerned, he receiving no consideration therefor. As a corollary of this rule, or at least, as another rule springing from the same fundamental reason, is the principle that the contract of a surety must not be extended or his risk increased beyond the original terms. Hence anything done between the debtor and creditor which increases the surety's risk, releases the surety. So it was held in National Park Bank of New York v. Koehler, Decision No. 1491, where the time of payment of the debt was extended without the assent of the surety. The court said:

"The existence of the general rule is not in dispute that, if there has been an agreement by the creditor with the principal debtor, which extends the time of payment of the debt, without the consent of the surety, or indorser, the latter is discharged. That there was an agreement, in this case, between the holder and the maker of the note is established, and what the parties intended thereby is to be ascertained by interpreting the proposition of the final letter in the light of what had preceded and of what was done thereafter. Having retained the new notes, which were inclosed in that letter, and having credited their amount to the Para Company, the plaintiff must be deemed to have assented to the proposition, accompanying their delivery, and to be bound by its legal effect as an agreement. The appellant contends that it operated in law as an agreement to extend the time of payment of the original note, and therefore to discharge him, as a nonassenting indorser. The respondent contends that the arrangement was meant, and was understood to mean, the reservation of the creditor's rights against the indorser and the retention of the rights of the latter against the principal debtor. It is claimed, in its behalf, that the agreement was conditional upon the assent of the indorser. Our

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negotiable instruments law (section 201 formulates the existing rule of law, as follows: 'A person secondarily liable on the instrument is discharged: . . . (6) By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

"The question before us is vexed, not because of instability in the rule of law established for the protection of an indorser, or surety, but in the application of the rule to the facts of the case. It is a rule, long recognized, that an accommodation indorser, or surety, is entitled to have the engagement of the principal debtor preserved, without variation in its terms, and that his assent to any change therein is essential to the continuance of his obligation. The reason of the rule is that his right must not be affected, upon the maturity of the indebtedness, to make payment and, by subrogation to the creditor's place, to at once proceed against the principal debtor to enforce repayment. Therefore it is that any agreement of the creditor, which operates to extend the time of payment of the original debt and suspends the right to immediate action, is held to discharge the nonassenting indorser, or surety; as the law will presume injury to him thereby. The creditor may arrange with his debtor in any way, which does not result in effecting either of these results. He may take, as collateral to the old note, new security, or other notes, and, if time is not given to the debtor, the indorser, or surety, will not be discharged. To prevent such a result, the agreement must expressly reserve all the remedies of the creditor against the indorser, or surety; in which case the latter will be in a position to pay immediately and, then, to proceed against the principal debtor."

See Decision No. 1491.

Quasi-Contracts: Voluntary Payments.

Nothing is more firmly established in the law than the principle that no man can make himself the creditor of another without that other's consent or default. This principle is reaffirmed in the case of Louisville & N. R. Co. v. Central Kentucky Traction Co., Decision No. 1492, where the court said:

"As a general proposition, one who voluntarily pays for another a debt or obligation owed by the other, without the request of that other, or who expends money on account of another, without the consent of that other, cannot recover the money laid out; and this upon the principle that no man can of his own volition make another his debtor."

So firmly established is this rule that the law in most States even goes to the opposite extreme. Suppose that B. owes A. $50. C., out of friendship for B., and without his consent or knowledge, pays A. the $50. By this act C. acquires no rights whatsoever against B. Not only is this so but the payment to A. does not wipe out B.'s debt.

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A. may still sue B. for the amount of the indebtedness, and B. in such case cannot set up C.'s payment to A. as a defense, even though A. expressly agreed with C. to accept the $50 in satisfaction of B.'s debt. Furthermore, even in such a case, although A. should recover from B. the amount of the debt, C. cannot recover from A. the $50 paid to him. While against natural justice this rule is probably logically correct — for technical legal reasons which need not be discussed here — and it is the law in the majority of jurisdictions.

See Decision No. 1492.

Quasi-Contracts: Illegality.

We have seen that in the absence of an express contract the law will often imply a contract in the interest of natural justice and equity. It must be borne in mind, however, that where there is an express contract the law will not imply one, but will leave the parties to their remedies under their express agreement. So holds Cashin v. Pliter, Decision No. 1493, the court saying:

"It is an elementary rule that, where there is an express agreement between parties covering the subject-matter, the law will not imply one.

In this case a statute forbade the transaction of business under an assumed name, and the court held that a contract made under an assumed name could not be enforced. Said the court:

"If we say that, the contract declared on being unenforceable, there was, as a matter of law, no contract, and so seek to imply one for the labor and materials furnished, then the implied contract, under the allegations of the declaration and proof offered, is not relieved of the infirmity; for plaintiffs furnished the labor and material and transacted the business under an assumed name in violation of law. Changing the name or form of pleading does not change the character of the illegal transaction; under whatever guise the claim is presented, its groundwork is a violation of the act. In such a case, the doctrine of estoppel cannot be invoked by the plaintiff; but the law leaves the parties where it finds them and refuses relief. It recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff. See Webster v. Sanborn, 47 Me. 471; Pangborn v. Westlake, 36 Iowa 548; Jameson v. Carpenter, 68 N. H. 62, 63, 36 Atl. 554; Chattanooga National Building & Loan Association v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 7 L. Ed. 870; 9 Cyc. 446, and numerous cases there cited."

This is not the law in many jurisdictions. Most States have laws forbidding the transaction of business under an assumed name unless a certificate setting forth the assumed name, the real names of the parties interested, etc., is filed. In most cases it has been held that

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such statutes merely render the party violating the same liable criminally, but do not impair the validity or enforceability of contracts entered into under the assumed name without filing. The conflict in the decisions may be reconciled in many instances by reason of the particular wording of the statute in point. Where even this will not reconcile it would seem that the latter view — upholding the contract — is the better. Such statutes are penal in their nature and the rule is well settled that penal statutes must be construed strictly.

See Decision No. 1493.

Sales: Passage of Title.

In a sale of personal property the question of when title passes is entirely one of the intention of the parties — at least in so far as the parties themselves are concerned. In this respect the law applies to sales the same rules that it applies to all other contracts — the construction given depending upon the intention of the parties. So it is laid down in Brown v. Simsboro Cash Store, Decision No. 1494, in these words:

"In determining whether or not there was a completed sale of the property to appellee under the facts of this case, the controlling question is, Was there a delivery of it at the time of the alleged sale? As between vendor and vendee of personal property, the passing of the title is ordinarily determined by a consideration of what was the actual intention of the parties. As between purchaser and seller, it is not necessary that there should be an actual change of the possession of the thing sold, in order to invest the buyer with the title if such is the actual intention of the parties. Priest v. Hodges, 90 Ark. 131, 118 S. W. 253; Guion Mercantile Co. v. Campbell, 91 Ark. 240, 121 S. W. 164.

"If the property is present, and the vendor, for an agreed consideration, then makes an unconditional sale of the property to the vendee, who, for an agreed price, accepts it, and at the time it is understood by both parties that the title to the property shall pass, then, although the actual possession of the property is still retained by the vendor as bailee for the vendee, the sale will still be complete. Under such circumstances, the contract of sale is absolute and binding, and the vendee's title will be protected, even as against attaching creditors or subsequent purchasers, if no element of fraud is connected with such contract of sale. Shaul v. Harrington, 54 Ark. 305, 15 S. W. 835; Hight v. Harris, 56 Ark. 98, 19 S. W. 235. We are of the opinion that there was sufficient evidence adduced upon the trial of this case showing that the property was purchased unconditionally by appellee at the price of $70, which was credited by appellee upon appellant's account to it, and that legal delivery of the property was made at the time, and actual possession thereof was only retained by appellant as bailee of the appellee. Under these circumstances the sale was complete, and the title to the property passed to appellee."

See Decision No. 1494.

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Sales: Passage of Title: Presumptions.

In the preceding note we have seen that as between the parties themselves the question of the passage of title is one of intention. Hallet & Davis Piano Co. v. Starr Piano Co., Decision No. 1495, adds one rule for ascertaining that intention. It is there laid down that on a present agreement of sale, especially when the purchase price has been paid, there is a prsumption that title has passed. The court said:

"It may be conceded that as between the parties, where there has been a sale of specific goods, and especially where the price has been paid, the title will pass without a delivery of the goods."

The court, however, goes on to say that the same rule does not apply to third parties dealing with the property, and that as to them a change of possession is necessary to pass title. On this point the court said:

"This, however, is only a presumption, and it does not ordinarily obtain as against creditors and innocent purchasers from the vendor. As to such third parties, it is the general holding that there must be not only a delivery to the vendee claiming the goods, but there must be an actual and visible change of possession. 35 Cyc. 304."

While the court undoubtedly goes too far in holding that an actual change of possession is necessary to pass title, especially in the absence of recording acts, it is just as undoubtedly true that what may constitute a passing of title as between the parties may not constitute such passing where the rights of third parties have intervened.

See Decision No. 1495.

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NOTES OF RECENT CASES.

Accord and Satisfaction.

CHARLES B. BARHAM & CO. v. KIZZIA, 140 S. W. (Ark.) 6, holds that where a check marked "in full payment" is sent in satisfaction of a disputed bill and the creditor accepts the same there is an accord and satisfaction as a matter of law, and the creditor may not sue for the balance. Some States, as we have seen, hold that such acceptance is only presumptively an accord and satisfaction and may be explained away.

Banks and Banking.

In MERCANTILE NATIONAL BANK OF CITY OF NEW YORK v. SILVERMAN, 132 N. Y. Supp. 1017, it was held that where a bank paid checks to the order of an imposter and where the imposter had dealt by letter only with the maker, the bank could not charge the depositor's account with the amount of such payments.

This case is distinguishable from Decision No. 1469 discussed in the editorial notes of this issue as in that case the maker had dealt personally with the imposter while in this case he had dealt by correspondence only.

Carriers: Duty to Passengers.

That carriers must exercise towards their passengers the highest degree of care that human foresight can suggest is laid down in THORSON v. GROTON & S. ST. RAILWAY CO., 81 Atl. (Ct.) 1024.

Carriers: Duty to Passengers.

To the same effect as to a carrier's duty to its passengers is LAKE ERIE & W. R. CO. v. HUFFMAN, 97 N. E. (Ind.) 434.

Contracts: Construction.

The effect to be given to terms in a contract whose meaning are in dispute may be ascertained by observing the practical construction which the parties themselves put to these terms. So held in BIXBY-THEISEN CO. v. EVANS, 57 So. (Ala.) 39.

Contracts: Construction.

W. R. SAUNDERS CO. v. DUCKER, 82 Atl. (Md.) 154, holds that in construing a contract regard must be had to the facts and circumstances surrounding its execution, and that general and indefinite terms are more susceptible of interpretation than specific ones.

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Payment.

A debtor owing several debts to the same creditor may indicate to which debt a partial payment is to be applied. If he fail to do so the creditor may make the application. Should the creditor fail to do so affirmatively, he is presumed to have applied it to the most precarious or least secured debt. So held in BELL v. BELL, 56 So. (Ala.) 926.

Quasi-contracts: Mistake of Fact.

BOARD OF HIGHWAY COMMISSIONERS v. CITY OF BLOOMINGTON, 97 N. E. (Ill.) 280, holds that money paid under a mistake of fact may be recovered back.

Quasi-contracts: Implied Contracts.

Where one performs services of value to another with the knowledge of that other under such circumstances that the services could not be deemed to be intended to be gratuitous, a recovery of the reasonable value of such services will be allowed even in the absence of any oral or written contract to that effect. So holds CASEY v. MAY, 97 N. E. (Mass.) 913.

Reformation of Instruments.

That it is not necessary to prove fraud but only mutual mistake in order to reform a contract is laid down in SNELLING & POTTER v. MERRITT, 81 Atl. (Ct.) 1039.

Sales: Passage of Title.

JOHNSON v. TABOR, 57 So. (Miss.) 365, holds that as between the parties delivery is not necessary to pass title in a sale of personal property.

Waiver.

FIKE v. SHATTON, 56 So. (Ala.) 929, holds that in an action for breach of contract, a breach not alleged is waived.

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DECISIONS.

Decision No. 1389.

BELL v. PITMAN.

(Court of Appeals of Kentucky. May 9, 1911.)

136 S. W. 1026.

ACCORD AND SATISFACTION — FRAUDS, STATUTE OF — BILLS AND NOTES — CONTRACTS — SET-OFF AND COUNTERCLAIM.

An accord, without a satisfaction, is no bar to an action on the original demand.

Where a promise or a new contract founded on a new consideration is accepted in satisfaction of a contract or claim, there is an accord and satisfaction, good without performance.

A contract by the maker to purchase his unmatured promissory note, of the face value of $3,000, at a definite date in the future, not being within the statute of frauds, need not be in writing.

The maker of a promissory note, not due for more than a year, may purchase it.

Where the maker of a promissory note, due January 1, 1910, on December 26, 1908, agreed with the holder that he would purchase it on January 1, 1909, the contract was finally concluded; a definite day being fixed for the delivery of the property and the payment of the price.

Where the maker of a note not yet due entered into a valid contract with the seller to purchase it at a discount, and the seller repudiated the contract and attempted to collect the full amount of the note, the maker could set off his damages arising from the breach of the contract of sale in the action brought by the holder of the note.

Appeal from Circuit Court, Graves county.

Action by Jasper Bell against F. P. Pitman. From a judgment for defendant, plaintiff appeals. Affirmed.

W. J. Webb, for appellant. Robbins & Thomas, for appellee.

HOBSON, C. J. On June 11, 1908, Jasper Bell conveyed to F. P. Pitman a farm in consideration of $8,000, $3,000 of which was paid in cash. Two notes were executed for the remainder of the consideration the first note being for $2,000, due January 1, 1909, and the second note for $3,000, due January 1, 1910, with interest at eight per cent. from January 1, 1909, until paid. On December 26, 1908, Pitman paid off the first note for $2,000, and it was then agreed between him

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and Bell that Bell would discount to him the second note at six per cent. off the face, or $180, and that Pitman would pay him the money, $2,820, on or before January 1, 1909. Pitman borrowed the amount, and on that day tendered him the money; but Bell refused to receive it. Afterwards he did accept it, and credited it on the note under an agreement that it could not prejudice the defendant's defense, or the plaintiff's claim for the balance of the note, and that this matter might be litigated. Bell then brought this suit against Pitman to recover the balance of the note, which exceeded $200, counting the interest down to the time the credit was given. The case coming on for trial before a jury, the facts were found to be as above stated, and Bell's petition was dismissed. He appeals.

(1) The question of fact was fairly submitted to the jury, and the only question to be determined on the appeal is whether the facts stated constitute a defense to the action. It is insisted for appellant that it is well settled that an accord without satisfaction is invalid, and is no bar to an action on the original contract. See 1 A. & E. Encyc. of Law and Practice 641, and cases cited.

(2) While this is true, there is a well-sustained exception to the rule, which is thus stated in 1 A. & E. Encyc. of Law and Practice 642, as follows: "It is an apparent, rather than a real, exception to the rule requiring the accord to be executed, that where a promise or new contract founded upon a new consideration is itself accepted in satisfaction of the contract or claim, there the accord and satisfaction is good without performance. But it must appear that the plaintiff accepted the agreement alone in satisfaction." Thus in Peace v. Stennet, 4 J. J. Marsh. 449, Peace pleaded that he had executed a note to Stennet, which Stennet had accepted in satisfaction of the claim. It was held that the plea was sufficient, although the note had not been paid. In Tomlin v. McChord, 6 J. J. Marsh. 1, McChord sold a tract of land to Tomlin, and he executed to McChord a note for $200, to be paid on certain conditions. When sued on this note, Tomlin pleaded that subsequently they had made an agreement by which he had executed a note to McChord, payable on other conditions, in compromise of the note sued on. It was held that the plea was good. In Price v. Price, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529, 23 Ky. Law Rep. 1086, 1911, the plaintiff held a note on the defendant for $4,000, and, when sued on the note, he pleaded that it had been agreed between them in writing that he should pay the plaintiff $62.50 every three months during his natural life, and that this should be in full of the $4,000 note. The defense was sustained.

(3) In the case at bar, the contract between the parties, not being within the statute of frauds, was not required to be in writing.

(4) The note which Bell held on Pitman was negotiable, and Pitman could buy this note, just as any stranger to the instrument might have bought it. The contract by Bell to sell Pitman the note is as valid as a contract by him to sell it to a third person. The note was not due for more than a year, and the contract by Pitman to buy it and to pay $2,820 for it on January 1, 1909, was based on a valid consideration, because Bell then had no cause of action against Pitman on the note. When Pitman agreed to buy the note and to pay $2,820 for it on January 1st, and Bell agreed to accept the $2,820 on that day

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and deliver the note to him, a valid agreement between the parties was made. Neither of them could subsequently break this agreement with impunity. In 2 Blackstone's Commentaries 447, the rule is thus stated: "If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary is expressly agreed. And, therefore, if the vendor says the price of a beast is £4, and the vendee says he will give £4, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases."

(5) Here a contract was finally concluded, as a future day was fixed by agreement for the delivery of the property and the payment of the price. Fairmount Glass Works v. Crunden-Martin Wooden Ware Co., 106 Ky. 659, 51 S. W. 196, 21 Ky. Law Rep. 264.

(6) When, upon the tender of the money on that day, Bell refused to deliver the note to Pitman, he became liable to him for damages on the breach of the contract, and the measure of damages is the difference between the value of the note and the price which Pitman was to pay for it. Bell, having wrongfully retained the note, should not now be allowed to recover on it against Pitman this money; for to allow a recovery would be to allow Bell to violate with impunity his valid agreement to sell the note to Pitman and deliver it to him on that day. The law abhors circuity of action, and the ends of justice require that Pitman be allowed to set up the breach of the contract in this suit. See Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; notes to Harrison v. Henderson, 100 Am. St. Rep. 436–438, 451; Chicora Fertilizer Co. v. Dunan, 50 L. R. A. 401.

Judgment affirmed.

Decision No. 1390.

CUNNINGHAM COMMISSION CO. v. RAUCH-DARRAGH GRAIN CO. et al.

(Supreme Court of Arkansas. March 13, 1911.)

135 S. W. 831.

ACCORD AND SATISFACTION — CHECK IN FULL PAYMENT.

After a meeting between the parties to endeavor to settle their difference as to the amount of defendant's indebtedness to plaintiff, defendant sent plaintiff a check stating on its face that it was in full payment, and plaintiff retained and cashed it. Held, that there was an accord and satisfaction, though plaintiff, immediately, on receipt thereof, wrote defendant, stating not only the receipt, and application to defendant's credit, of the check, but that it did not accept it as settlement, and this though defendant did not answer, there being nothing in the letter indicating that the check would be returned if defendant so desired.

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Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by the Cunningham Commission Company against the Rauch-Darragh Grain Company and another. Decree for defendants, and plaintiff appeals. Affirmed.

J. W. Blackwood and J. W. Newman, for appellant. Marshall & Coffman, for appellees.

FRAUENTHAL, J. This was an action instituted by the Cunningham Commission Company, plaintiff below, to recover the balance of an account which it alleged was due to it by the Rauch-Darragh Grain Company, one of the defendants, and also to discover and follow the assets of that company, which it alleged were wrongfully held by the other defendants. The defendants pleaded payment, and the case was tried upon the issue of accord and satisfaction, and both parties fully developed their evidence upon that issue.

The plaintiff was a domestic corporation, engaged in the grain business, and the defendant, the Rauch-Darragh Grain Company, was also a domestic corporation engaged in handling corn and milling same into chops, meal, etc., and both corporations were located at Little Rock, Ark. The plaintiff had furnished to said defendant a number of cars of corn and other grain upon an account which extended over a number of months during the year 1905. A part of this grain was furnished with the understanding that it should be paid for by the exchange of like commodities to be obtained from the defendant, and the other grain was furnished with the understanding that it should be returned in the manufactured products of meal and chops, the plaintiff paying for the grinding, handling, and sacking thereof. A dispute arose between the parties as to the amount which was due to plaintiff upon said account. The controversy grew principally out of four cars of corn which were furnished to defendant in April, 1905. Two of these cars contained white corn and the other mixed corn; and all of this corn the testimony indicated was badly damaged. The purpose was to grind it and mix it with products of good grain so as to make it merchantable. It was claimed by the plaintiff that the greater portion of these four cars of corn had never been returned to it or accounted for by the defendant. The defendant, on the other hand, claimed that the two cars of white corn had been ground into meal and hauled to plaintiff's warehouse, and that the remainder of the corn had been ground and mixed with other products and turned over to plaintiff. Some other items of the account were also in dispute.

A few days prior to October 25, 1905, Mr. Cunningham, representing the plaintiff, and Mr. Rauch and Mr. Darragh, representing the defendant, met at the office of the plaintiff in order to adjust and settle their differences relative to the disputed account. The parties representing the defendant testified that all items of grain which had been furnished by plaintiff to defendant, and all items of the account, were considered at this meeting, and that the disputed items involving said four cars of corn were also considered in the consultation and settlement. They testified that the parties made mutual concessions

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and allowances in considering the various items of the account, and finally arrived at a determination of the amount which was due by the defendant to the plaintiff, and that it was agreed that the final balance due by defendant amounted to $250.73, and that Mr. Cunningham agreed to accept a check for that sum in full payment of all times due to it, including the four cars of corn. On the other hand, Mr. Cunningham testified that, while the parties had met and discussed the various items of the account, the four cars were not included in the settlement, and that he did not agree to accept the above amount in payment thereof. On October 25th the defendant sent to the plaintiff a check for the above sum of $250.73 in full settlement of all its indebtedness to the plaintiff, and it was stated on the face of the check that it was in full payment thereof. The plaintiff retained the check and cashed the same shortly after its receipt, but immediately wrote the following letter, which was delivered at defendant's office within a few hours thereafter:

"Little Rock, Ark., October 25, 1905.

"Rauch-Darragh Grain Co., City — Gentlemen:

"Your check for $250.73 received and applied to your credit. We wish to advise, however, that we do not accept same as settlement, as there are a number of items that we will not agree to. We will check your statement within the next few days and advise you concerning same. Yours, etc.,

"Cunningham Commission Company."

The messenger who testified that he delivered this latter letter also testified in the same connection that he went to the bank, and we think that it can be reasonably inferred from the testimony that this letter was delivered after the check was cashed. The defendant made no reply to this letter, and its officers testified that it was never received by them or at its office. The chancellor made a finding that while there was some amount due to the plaintiff, after crediting the amount of the check upon the account, the plaintiff accepted the check with the understanding that it was sent in full payment of the indebtedness of defendant to plaintiff, and that there was an accord and satisfaction of the disputed account between the parties, and he thereupon entered a decree dismissing the complaint.

We think that the evidence tends to prove that there was a dispute and controversy between the parties relative to the amount of the indebtedness due by defendant to plaintiff, and that this dispute related to various items of the indebtedness, including the above-mentioned four cars of corn. The parties met for the purpose of endeavoring to settle the differences as to said indebtedness, and, whether or not they agreed to a definite amount which would be received by the plaintiff in full payment thereof, the testimony shows that the defendant sent the check for the $250.73 in full payment of the disputed indebtedness, and that the plaintiff, when it received the check, understood that the offer or tender of the check was made upon the condition that it should be received and accepted in full payment of all indebtedness due by defendant to plaintiff. The check contained the statement upon its face that it was in full payment, and the plaintiff testified that immediately on its receipt the above letter was written, which shows that the plaintiff understood that the check

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was sent and tendered upon condition that it should be received in full payment. The plaintiff with this knowledge retained and cashed the check. This, we think, amounted to an accord and satisfaction. The case, we think, is ruled by the case of Barham v. Bank of Delight, 126 S. W. 394, 27 L. R. A. (N. S.) 439. In that case we held that, when a debtor sends a check to his creditor to apply upon a disputed claim bearing on its face a statement that it is a payment in full, the retention and collection of the check by the creditor renders it an accord and satisfaction of the debt.

It is urged by counsel for plaintiff that there was no accord and satisfaction in this case because the plaintiff immediately on receipt of the check wrote the above letter to defendant, in which it stated that it did not accept the same as a settlement of the indebtedness. But in the same letter it is stated that the check was received and applied to the credit of the account. It thus indicated that it had appropriated the check, and would not in any event return same to defendant.

It is urged by plaintiff that it was incumbent upon defendant to answer this letter, and state that it did not agree to permit the check to be only applied as a credit upon the indebtedness, if it did not consent thereto. But we do not think that a reply was necessary. The plain import of the language of this letter indicated that the plaintiff had received and retained the check and had appropriated it on the indebtedness. There was nothing in the letter which indicated that they would return the check if it was so desired by the defendant. If the plaintiff had intended to return the check in the event the defendant had not desired to consent to it being placed only as a credit on the account, then it should have stated so in apt language. Its conduct shows that this was not its purpose, for, in addition to stating in the letter that it had applied the check to the credit of the account, it did actually cash same. But, as stated in the case of Barham v. Bank of Delight, supra: "If an offer of payment was made upon condition, and the plaintiffs so understood it, there was but one of two courses open to them: Either to decline the offer and return the check, or to accept it with the condition attached. The moment plaintiffs indorsed the check and collected it, knowing that it was offered only upon a condition, they thereby agreed to the condition and were estopped from denying such agreement. It was then that the minds of the parties met, and the contract of accord and satisfaction was complete in law." The chancellor made findings of fact as above indicated, and we think that they were well supported by the testimony adduced upon the trial of the case.

Under these circumstances, we think that the conclusion at which he arrived is correct, and the decree is accordingly affirmed.

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Decision No. 1391.

In re SAYED.

Appeal of FIRST NATIONAL BANK OF BOYNE CITY.

(District Court, W. D. Michigan, S. D. September 16, 1910.)

185 Fed. 962.

BANKRUPTCY — "PREFERENCE."

In order to constitute a preference, the transfer must be made by the debtor while insolvent, and must be given with the intent on his part to give a preference, to wit, to pay one creditor, leaving others in danger of not being paid to the same extent, and the receiver must also believe that the debtor has such intent.

Where a bankrupt while solvent assigned a land contract to a bank in consideration of present and future advances to improve buildings on the land, and neither the contract nor the assignment were witnessed or acknowledged so as to be entitled to record, the transfer was "made" when the assignment was delivered to the bank and an advancement made on the faith thereof, and not when a new assignment to the bank's successor was executed and recorded.

Under the rule that one who receives security in exchange for a present loan is not of the same class as an existing creditor of the borrower, security given for a present loan is not a preference, though the borrower is insolvent.

Where a bankrupt while solvent transferred a land contract to a bank to secure a present loan and future advances to a specified amount, each advancement, in effect, constituted a loan in exchange for a present security, and was not therefore a preference.

Under the Michigan law, a vendee's interest in land contract is for most purposes real estate and is so treated for purposes of recording, but creditors of the vendee have no interest in the question of recording, unless they become purchasers through an execution sale.

Since under the Michigan law neither a land contract nor an assignment thereof is "required or permitted to be recorded" in order to give it validity as against creditors of the apparent owner who have not become purchasers of such owner's alleged interest at an execution sale, though having a specific lien, the owner's trustee in bankruptcy representing creditors not having so purchased held not entitled to attack the validity of the transfer made more than four months before bankruptcy, and when the bankrupt was solvent, on the ground that it had not been recorded until after bankruptcy.

In the matter of bankruptcy proceedings of Alexander Sayed. On appeal of the First National Bank of Boyne City from a referee's order allowing a trustee's petition to vacate an assignment of a real estate contract. Referee's conclusion overruled, and petition denied.

W. H. Eastman, for Sayed. G. A. Wolf, for trustee.

DENISON, District Judge. Alexander Sayed was a merchant in Boyne City. He purchased a store building, made a payment, and received a land contract in the usual form. On July 23, 1907, he had paid $700 out of the total purchase price of $2,200, and on that day he applied to the Boyne City State Bank for a loan or a line of credit

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of $1,200 for the stated purpose of improving the building. It was agreed that he should assign to the bank his interest in the real estate and in the land contract as security, and that the bank would advance him from time to time the amounts which he needed. Accordingly he indorsed upon the foot of his contract an assignment to the bank of his interest therein, and delivered the contract to the bank. Neither the original contract nor this assignment was witnessed or acknowledged so as to be entitled to record, and neither was, in fact, recorded. The bank advanced him $200 July 23, 1907, and various other sums so that the total January 1, 1908, was $800; and advanced $500 further on March 20, 1908. On February 3, 1908, the Boyne City State Bank was reorganized as the First National Bank, and took a general assignment of all assets and securities of the old bank and thereafter carried the loan. October 23, 1908, the First National Bank took from Sayed a new assignment of the land contract, but this was only in aid of the assignment from the State to the National Bank, and did not create any new security. These existing loans, amounting to $1,300, were continued by renewals until the petition in bankruptcy was filed, December 24, 1909. The question is whether the assignment of this contract to the bank constituted a preference. The referee has reached the conclusion that such assignment was invalid because it was not recorded for months prior to the adjudication. The unquestioned fact seems to be that at the time the original assignment of the contract was made Sayed was solvent and continued to be for a year or more. He was insolvent when the petition was filed.

This assignment of the land contract in question was a "transfer," and I think the controlling question on this branch of the case must be whether this transfer was "made" when the paper was signed and delivered and took effect as the loans were made, or must be construed as not made until it was recorded. If the former, the transfer was not a preference, because it was not made while the debtor was insolvent, and there was no intent on either side to give or receive a preference, and it was for present and future advances. If the latter, it may be said, owing to the condition of things then existing, to be clearly a preference.

It is familiar history, in connection with the original bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), that the giving of a preference might come within the definition of acts of bankruptcy, and so might by reason of the time provision for recording found in connection with this definition be the basis of an adjudication; and yet that same preference could not be set aside by the trustee under section 60, because more than four months time had elapsed after the giving of the preference, and before the filing of the petition in bankruptcy. To meet this difficulty, the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]) to section 60b provided that, if the instrument of preferential transfer was one which by law was required or permitted to be recorded, the preference might be set aside if the bankruptcy petition was filed within four months after the day of recording. The Court of Appeals in this circuit has said that the purpose of this amendment was to bring the two sections into harmony, and that the provision concerning recording should receive the

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same construction in each section. In re Loeser v. Savings Bank, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233.

It is elementary to the definition of a forbidden preference, considered under any section and for any purpose, that it must have been made by the debtor "while insolvent." A solvent debtor cannot make a preference. It is therefore essential to the argument of the trustee that this transfer of the land contract to the bank was not "made" in 1907, when it was signed and delivered, nor in 1908, while the bank was making advances on the strength of it; and, indeed, that it had never been "made" down to the date of the adjudication, because it was not recorded until after adjudication. I cannot adopt this theory. The transfer was absolutely and completely made in July, 1907, and all the incidents of security for the amount now due had attached as early as March, 1908, and during all this time Sayed was perfectly solvent, and had a right to give such a security and the bank had a right to receive it.

Carrying the same inquiry a step further, we find that the intent to give a preference — that is, to pay one creditor leaving other creditors in danger of not being paid as fully — must exist on the part of the giver of the security at the time it is given, and the receiver must then have cause to believe that the giver has such intent. Most certainly, in July, 1907, or March, 1908, Sayed had no such intent, and the bank cannot be charged with any notice of an intent which did not exist.

It is said that a construction of the act which leaves such an unrecorded transfer in legal effect after bankruptcy destroys the force of the act by providing easy means of avoiding the act. If this were true, it could not justify the judicial legislation which seems to me necessary in order to adopt the trustee's theory; but I do not think it is true. The instances where any one has a moral or ethical standing to attack a security given by a perfectly solvent debtor are rare, although they may sometimes occur, and such exceptional instances do not justify straining the statute. If such an instrument is withheld from record by agreement between the parties for the purpose of giving a fictitious credit, it then involves the element of actual fraud, and the question is quite different.

Some decisions are cited from other circuits, which, while they could be well distinguished on their facts from this case, yet doubtless indicate that the judges writing those opinions thought the statute should be construed as though it said that any transfer, the recording of which was required or permitted by law, should be a preference, if the transferrer was insolvent at the time the instrument was recorded; but, in the absence of any controlling decision, I cannot accept this view. The intent on the part of the transferrer must exist at the critical moment. If that moment be the instant of recording, how can it be said that the transferrer then has that intent, when he perhaps gave and delivered the instrument two years before, while he was perfectly solvent, and had continuously supposed that it was recorded, as might well be the case if the lack of recording had been from the carelessness of the secured creditor.

The trustee has another difficulty to overcome. A security is not a preference, unless it put one creditor ahead of others of the same class, and one who receives security in exchange for a present loan is

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not one of the same class as an existing creditor. Hence a security given for a present loan is not a preference, no matter how insolvent the creditor may be. In this case, $200 of the amount was loaned at the time the assignment of the contract was given. There was an indefinite agreement to make further loans on the same security, and further loans were, from time to time, made, all while the debtor was solvent and all while there was no obligation under the bankrupt law for any recording. Each time that the bank was requested to and did advance an additional amount, it did it on the strength of the security which it already had received in contemplation of such future advances, and it seems to me that each such advance is, in substantial effect, a loan in exchange for present security. Each time by virtue of the transaction the bank contemporaneously received an additonal interest in the security. In March, 1908, each fraction of the total existing loan had been paid over upon the faith of security received or attaching at the time of the advance. I do not think this situation is at all changed by the fact that the old bank transferred the loans and the security to the new bank, and that the new bank afterwards took a new assignment, somewhat more formal, but which did not change the rights of any one.

The trustee has still another difficulty. He must depend upon the theory that the assignment of this land contract was a transfer, the recording of which was required or permitted by law; that is, by the law of Michigan. In the form in which these papers stood they were not entitled to record, and any attempt at a record would have been a nullity. This is for the reason that neither the contract nor the assignment to the bank was witnessed or acknowledged. I doubt whether this informality is important, because the law must refer to instruments of a class capable of being recorded when they are in proper form, and it would be over-technical to say that parties by omitting formalities in the execution of a transfer may make it valid in bankruptcy when it would otherwise be invalid; but the question is deeper than that. Under the laws of Michigan, the interest of the vendee in a land contract is for most purposes real estate, and is so treated for purposes of recording. The creditors, however, of the vendee have no interest in this question until they become purchasers through an execution sale. The ordinary creditor without specific lien, being that class of creditor represented by the trustee in bankruptcy, has no concern with the point. A land contract or the assignment of a land contract is not "required or permitted" to be recorded under the law of Michigan for the purpose of making it valid as against those who give credit to the apparent owner. True, it is in one sense "permitted" to be recorded; but there is no apparent reason why a creditor of Sayed should, acting through the trustee in bankruptcy, be permitted to set aside an unrecorded conveyance of real estate, when, except for the bankruptcy, the same creditor, even with a specific lien, could not defend against such conveyance nor attack it, so long as he remained a creditor nor until he became a purchaser. To decide this question involves a careful application of the recording laws of the different States where decisions have been made, and I think considering the other and decisive questions involved in this case, is unnecessary.

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The amendments of June 25, 1910, make some of the matters discussed herein quite unimportant for the future.

I feel compelled to overrule the conclusion of the referee, and to direct that the trustee's petition to vacate the assignment be denied, All matters of costs and allowances will remain with the referee.

Decision No. 1392.

IN RE FEDERAL LUMBER CO.

(District Court, District of Massachusetts. February 17, 1910.)

185 Fed. 926.

BANKRUPTCY.

To constitute an act of bankruptcy by a corporation under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), by general assignment for creditors, some corporate act purporting to transfer all the corporation's property must at least be shown.

As constituting an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), a general assignment for creditors may be made without a formal deed.

A general assignment for creditors is no less an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), because invalid for some other purposes.

Preparation of a deed of general assignment for creditors not signed nor out of escrow is not an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

A corporation's adoption of resolutions authorizing the treasurer to convert the corporate assets into cash to be deposited with a trust company for the creditors' benefit did not constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as a general assignment for creditors, where the plan was not executed.

In the matter of the Federal Lumber Company, bankrupt. On question of adjudication. Petition dismissed.

Jacobs & Jacobs, for petitioning creditors. Hutchins & Wheeler and Lincoln Bryant, for alleged bankrupt.

DODGE, District Judge. The stockholders of this company held a meeting May 12, 1909, to the regularity of which no objection is raised. At that meeting they passed resolutions as follows:

"To accept the offer of the Lincoln Trust Company of the city of New York, to act as a depository for the creditors of the Federal Lumber Company free of charge, and that the said trust company in accepting said trust is hereby relieved of any responsibility for the accuracy or validity of the claims against the Federal Lumber Company, and it is hereby authorized to accept the list furnished by the treasurer of the said Federal Lumber Company, as being all the creditors, and to act upon said list without further responsibility or

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inquiry upon its part, it being understood that the said Lincoln Trust Company is acting solely as agent and trustee for the Federal Lumber Company and its creditors.

"That the treasurer of the Federal Lumber Company be and he hereby is authorized to convert into cash as speedily as possible all assets of the corporation, and to collect all accounts due the corporation, and to deposit the same, with all moneys received from the sale of the assets, in the said Lincoln Trust Company, to be held by said trust company in trust for the creditors of the Federal Lumber Company, the names of each creditor and the amount due each to be furnished to said trust company by the treasurer of the Federal Lumber Company; all moneys so deposited to immediately become the property of said creditors and to be distributed, pro rata, among said creditors.

"The first distribution to be made when the said trust company shall have on hand 50 per cent. in cash; but in event of 50 per cent. not being available by September 1st, 1909, a distribution of all funds on hand must be made on that date.

"The second distribution to be made when an amount equal to 20 per cent. shall have accumulated; but in event of 20 per cent. not being available by December 1st, 1909, a distribution of all funds on hand must be made on that date, and subsequent distribution be made quarterly thereafter, until the full amount of claims with interest at 6 per cent. per annum shall have been paid.

"That upon the final payment of all claims that the president call a meeting of the stockholders to vote upon a proposition for the dissolution of the corporation."

The offer made by the trust company and accepted by the resolutions was not in writing, and there is no direct evidence as to its terms.

Thereafter, in pursuance of arrangements made at interviews in New York between the treasurers of the two companies, notice was sent by the Lincoln Trust Company to all the Federal Lumber Company's creditors, according to a list of them furnished for the purpose by the Federal Lumber Company, inclosing a copy of the resolutions. Some, but not all, of the creditors thereupon filed claims with the Lincoln Trust Company. The treasurer of the Federal Lumber Company never made any deposit with the Lincoln Trust Company in accordance with the resolutions. He never attempted to make any until Friday, June 18, 1909. On that date he mailed to the Lincoln Trust Company a letter, inclosing a check for $300 to its order. The trust company returned the check with a letter dated Monday, June 21, 1909, in the terms following:

"We acknowledge your letter inclosing check to our order for $300 on account of collection of the assets of your company, and beg to advise you that we do not care to accept this deposit until all the creditors named to us have filed their claims with us.

"At the present time creditors numbering twenty-one, holding claims amounting to $12,639.92, have not expressed their willingness to assent to your proposition, and as we understood from you originally that this plan was formulated at the request of the holders of claims against you and that getting their assent was merely a matter

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of form, we feel that the amount of labor and risk to us involved in this matter so far outweighs any compensation that can arise to us from the use of the money, that we desire to resign as your agent in this matter. We will delay notifying the creditors to this effect as a matter of courtesy to you, until you have an opportunity of replying to this letter. We return check."

It is evident from the terms of this letter that the trust company's offer, accepted by vote of May 12, 1909, had been an offer conditioned upon the assent of all the lumber company's creditors, and that there had not been any agreement on the part of the trust company to take over the lumber company's funds and the proceeds of its assets, when sold, upon trust for its creditors, whether those creditors agreed to the arrangement or not. The plan for the transfer of said funds and proceeds upon the terms set forth in the resolutions was abandoned and nothing further done in pursuance of it.

As a consequence, however, of further negotiations between the Lumber Company's treasurer and the trust company, it was later agreed that the lumber company, having converted all its assets into money, should ascertain the amount of each creditor's share and thereafter deposit with the trust company, in the name of each creditor, the amount found due him, and that the trust company should on September 1st pay over and deliver to the creditors the amounts thus deposited in their respective names. The trust company sent letters to creditors, dated July 1, 1909, stating that it was informed:

"That the company proposes to deposit with us to your credit sums received from their collections from time to time to be payable to you on September 1, 1909, and we will on that day mail you our check for such amount so deposited."

The lumber company, however, never sent any money to the trust company, which on September 2, 1909, by a letter of that date, advised the lumber company that it was that day communicating with the various creditors —

"stating that as you have not lived up to your agreement with us, and, as no funds have been deposited with us for the account of the creditors, we have entirely severed our connection with you in this matter."

The lumber company at no time executed any instrument purporting to be an assignment of its property to the trust company. There never was any agreement between the two companies that the trust company should receive any compensation beyond the use of the money deposited, nor was there ever any agreement that the creditors should accept what might come to them from the trust company in full settlement of their claims.

The petitioning creditors contend that upon these facts, which are all the material facts proved, the lumber company must be held to have committed the fourth act of bankuptcy described in section 3a(4) of the bankruptcy act, or, in other words, to have "made a general assignment for the benefit of its creditors." Act July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422). The referee has found that "this scheme or arrangement amounted to a general assignment for the benefit of creditors and constituted an act of bankruptcy."

The scheme or arrangement adopted by the stockholders' resolu-

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tions may have been such as would have amounted to a general assignment and constituted an act of bankruptcy if carried into effect, but, unless it can be said that by the vote and what was done in pursuance thereof a general assignment was "made," it cannot be said that an act of bankruptcy was committed. Voting to make a general assignment is not necessarily the same thing as making one. [1] Before it can be said that a corporation has made a general assignment, I think that some corporate act purporting to be a transfer of all the corporation's property must at least be shown.

[2] It is true that a general assignment may be made without a formal deed of assignment. Thus in Re C. H. Bennett Shoe Co. (D. C.), 140 Fed. 687, the stockholders of the corporation signed an agreement, and an appointment such as under the laws of Connecticut had the effect, and was understood by them to have the effect, of assigning its property to its directors, and making them trustees to wind up its affairs. Thus in Re Salmon (D. C.), 143 Fed. 395, part of the alleged bankrupts' property had been taken charge of by a State official, according to the provisions of certain State laws, for the benefit of all their creditors; and, the bankrupts having thereupon conveyed to the same official the remainder of their property for the benefit of all their creditors, it was held that the two transactions together amounted to a general assignment. And thus in Re Thomlinson Co., 154 Fed. 834, 83 C. C. A. 550, a bill of sale of all the bankrupt's property conditioned that the grantee should sell or convert it into money, pay all the creditors pro rata with the proceeds and return the surplus, if any, to the grantor, was held to amount to a general assignment. In all such cases, however, what was done was done with the intent that it should effect a present transfer of all the grantor's property.

[3] It is true also that if a grantor makes for the benefit of his creditors what purports to be and is intended by him to be a general assignment, and is accepted as such by the assignee named, this will be none the less an act of bankruptcy though invalid for some purposes. Re Meyer, 98 Fed. 976, 39 C. C. A. 368, and, under Act March 2, 1867, c. 176, 14 Stat. 517, Re Mendelsohn, 2 Sawy. 342, Fed. Cas. No. 9,420, Re Lawrence, 10 Ben. 4, Fed. Cas. No. 8,133. In Griffin v. Dutton, 165 Fed. 626, 91 C. C. A. 614, the Court of Appeals for this circuit held an assignment so made and accepted an act of bankruptcy, though neither the form in which the bankrupt had signed it nor the signature of the assignee could be proved with certainty, the instrument itself having been lost, and though no creditor had assented to it. In Canner v. Webster Tapper Co., 168 Fed. 519, 93 C. C. A. 541, the same court held such an assignment an act of bankruptcy, though the assenting creditors repudiated it and were held to have the right to repudiate it because their assent had been induced by fraud and misrepresentation.

[4] But in all the above cases the grantor had gone far enough to make what had been done a transfer of all his property, so far as his part in the transaction was concerned. If he has stopped short of that point, however clearly he may have manifested his intention to make a general assignment, he cannot be said to have made any. He may have prepared a deed of assignment with intent to execute it, but, so long as he has left it unsigned or in escrow, the general assignment contemplated has not been made. Lowell, Bankruptcy, § 37.

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If a corporation has approved a deed of general assignment and authorized its execution by an officer, execution by him would seem to be necessary before it can be said that the assignment has been made. And if, as here, no deed is to be made, but an officer is authorized to make a future transfer of the property according to a plan approved, I do not think a general assignment can be said to have been made while all the property remains untransferred. In Re Hartwell Oil Mills (D. C.), 165 Fed. 155, the corporation's stockholders voted to authorize the directors to appoint a commission empowered to sell the property for cash, wherewith its debts were to be wound up and settled according to law, but it was held that no general assignment had been made. In like manner, where the question was as to the commission by a corporation of a different act of bankruptcy, it was held in Re Baker-Ricketson Co. (D. C.), 97 Fed. 490, that a vote authorizing an officer in case an involuntary petition against the corporation should be filed to appear and admit in writing its insolvency and its willingness to be adjudicated was not the making of such an admission by the corporation itself. See, also, to the same effect Re Southern Steel Co. (D. C.), 169 Fed. 702.

[5] The resolutions passed May 12, 1909, did not transfer any of this corporation's property. They were not intended and did not purport to have any such effect. After they were passed the corporation's property was as much its own as before they were passed. They did nothing more than to authorize the treasurer to make a future transfer upon certain terms after he had converted the property into money. They did not, as the facts show, bind the corporation to carry any transfer into effect.

The treasurer never made any transfer in pursuance of the resolutions. The $300 of the corporation's funds which he offered the trust company they were not bound to accept, and they refused to accept it. As to the plan for deposits with the trust company of separate amounts to the credit of each of its creditors, respectively, which was substituted for the plan described in the resolutions, if it would ever have been possible to say that such a plan amounted to a general assignment, this plan was abandoned before any steps were taken toward carrying it out.

If there was no transfer, there was neither a preferential nor a fraudulent transfer as alleged in the petition.

I am obliged to hold that the commission of the acts of bankruptcy relied on has not been proved, and that the petition must be dismissed.

Decision No. 1393.

INGBER ET AL. v. TRADESMEN'S NAT. BANK.

(Supreme Court of Pennsylvania. February 27, 1911.)

79 Atl. 751.

BANKS AND BANKING — DEPOSITS.

Where a depositor agreed with the bank that he would draw a check upon his account, which should be certified by the bank, properly indorsed, and retained by the bank as collateral for any debt he might owe the bank for loans, and the check

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was certified and immediately charged upon the bank books against the depositor's account, which books were balanced in the depositor's lifetime, showing the charge so made, the executors of the depositor could not recover the amount of such check from the bank as a balance on deposit in the depositor's name.

Appeal from Court of Common Pleas, Philadelphia county.

Action by David M.Ingber and another, executors of Jacob M. Ingber, against the Tradesmen's National Bank. Judgment for defendant, and plaintiffs appeal. Affirmed.

Assumpsit for balance of deposit. The facts appear in the opinion of the Supreme Court. The letters which accompanied the certified checks in each case were both of the same import, as follows:

"Tradesmen's National Bank, Philadelphia — Dear Sirs:

"With reference to our check, No. 1,231, dated January 18, 1908, for $1500, which was certified by you January 18, 1908, and which is now held by you, with our consent, as general collateral for our account and for any indebtedness of ours to the bank, we hereby authorize you to apply the same at any time you may desire towards the liquidation of any notes discounted by you for our account at maturity thereof, or prior thereto as you may deem fit. Yours very truly,

"Jacob M. Ingber & Co."

The jury rendered a verdict for the defendant, in pursuance of binding instructions given by the court.

Argued before FELL, C. J., and BROWN, MESTREZAT, MOSCHZISKER, POTTER, and ELKIN, JJ.

Julius C. Levi, for appellants. Charles Biddle and Bayard Henry, for appellee.

ELKIN, J. Appellants are the executors under the will of decedent, who died insolvent. This suit was brought to recover the balance alleged to be deposited in the bank of appellee, with which institution the decedent kept his bank account. At the trial the learned court below directed a verdict for defendant, and judgment was accordingly entered.

It is contended that under the facts the trial judge erred in giving binding instructions to the jury. The theory upon which this claim is predicated is that at the date of the death of the insolvent decedent he had a balance to his credit in the bank of $3,725.80, and that this balance was an asset of the estate, to be accounted for by the executors to the creditors. This would be true, if in fact there was such a balance in the bank at the death of decedent. But this fact is denied, and the bank books show that the balance was only $725.80, which amount it is admitted was paid by the bank to the appellants. The controversy arises out of the appropriation of $3,000 under the following circumstances: The decedent carried an active account with the bank and desired to make some loans. He entered into an agreement with the bank, in which it was stipulated that he would draw a check upon his account for $1,500, which check should be certified by the bank, properly indorsed, and then be retained by the bank as collateral for any indebtedness of the maker to the bank. The evidence

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shows that this arrangement was carried out. At a subsequent date an agreement of the same import, involving the same amount, and including the same terms, was made and carried out.

The testimony of the cashier, which is not contradicted, conclusively shows that, upon the very day when each check was certified, it was immediately charged upon the books of the bank against the account of decedent, in whose lifetime the books were balanced, showing the charges thus made. At the time of decedent's death his own bank book showed the appropriation by the bank of the respective amounts for which the certified checks were drawn. These transactions were carried out in strict compliance with the terms of the agreements entered into, and we can see no reason in law or equity why an agreement of this character, lawful in its terms and properly made in the course of business dealings, should be disturbed. The bank became liable for the payment of the check as soon as it was certified, and very properly charged the account of the maker with the amount of each check as soon as its liability for payment attached. The fact that the bank took this method of securing the payment of existing obligations or of indebtedness to be incurred does not change the nature of the transaction or the liability of the contracting parties. If authority need be cited for this proposition, it may be found in our own cases. See Chase v. Petroleum Bank, 66 Pa. 169; First National Bank v. Gish's Assignees, 72 Pa. 13; Hemphill v. Yerkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607; Taylor's Est., 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855; Spott's Est., 156 Pa. 281, 27 Atl. 132.

Judgment affirmed.

Decision No. 1394.

FARMERS' NAT. BANK OF CENTER ET AL. v. MERCHANTS' NAT. BANK OF HOUSTON.

(Court of Civil Appeals of Texas. April 19, 1911. Rehearing Denied May 4, 1911.)

136 S. W. 1120.

BANKS AND BANKING — COLLECTIONS.

Evidence in an action involving the question of negligence in not collecting a draft held to show no negligence of plaintiff bank, with which it was deposited for collection, or of the bank to which plaintiff forwarded it.

Where plaintiff bank, with which defendants deposited a draft for collection, on getting notice that the draft had been received by the bank to which it was forwarded for collection, entered the amount of the draft to defendants' credit, and permitted them to check it out in the ordinary course of business, this was an advancement or loan to them on the faith of the payment of the draft, so that they were liable therefor to it; the draft not having been paid, through no fault of it or the other bank.

Plaintiff bank, with which defendants deposited a draft for collection, though never collecting it, having notified them that it was collected, and not having notified

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them to the contrary till it was too late to share in the insolvent estate of their debtor, because of its negligence in not so notifying them, is liable to them for the proportion of the draft which could have been collected by presenting the claim in the insolvency proceedings.

Where a draft, deposited with plaintiff bank for collection, was forwarded by it to defendant bank to collect, and plaintiff, immediately on notice of its receipt by defendant, entered the amount thereof to the depositor's credit, which they immediately drew out, any subsequent negligence of defendant, in making statements showing the amount of the draft to plaintiff's credit, when the draft, through no negligence, however, was never collected, did not make it liable to plaintiff; plaintiff being entitled to recover of the depositors the amount it advanced to them, and being liable to them only because of its negligence in not informing them of nonpayment of the draft in time for them to present their claim against the insolvent estate of their debtor, whereby they could have secured payment of part of it, and plaintiff having been informed by defendant of the nonpayment in time for this.

Appeal from District Court, Shelby county; James I. Perkins, Judge.

Action by the Farmers' National Bank of Center against the Merchants' National Bank of Houston and others. From the judgment in favor of defendant bank, plaintiff appeals; and from the judgment for plaintiff against defendants Potts & Lynch, said Potts & Lynch appeal. Judgment for defendant bank affirmed, judgment for plaintiff reversed, and case remanded.

D. M. Short & Sons, for appellants Potts & Lynch. Bryarly, Carter & Walker, for appellant Farmers' Nat. Bank. Davis & Davis, Lane, Wolters & Storey, and Wm. A. Vinson, for appellee.

McMEANS, J. The Farmers' National Bank of Center, hereafter called the Farmers' Bank, brought this suit against the Merchants' National Bank of Houston, hereafter called the Merchants' Bank, and Potts & Lynch, a copartnership composed by W. C. Potts and W. H. Lynch, to recover the amount of a draft drawn by Potts & Lynch in favor of the Farmers' Bank upon the Valley Lumber Company for $1,500. Plaintiff alleged that on the 3d day of June, 1907, Potts & Lynch drew a customer's draft on the Valley Lumber Company, a corporation, in favor of the Farmers' Bank for $1,500, and that said bank received the same for collection and forwarded it to the Merchants' Bank; that it was received by the latter on June 5, 1907, and receipt thereof was acknowledged on said date, with the statement that the amount of the draft had been credited to the account of the Farmers' bank; that on receipt of this advice the Farmers' Bank credited the account of Potts & Lynch with said sum, and notified them that they could draw against said sum in the usual course of business, which they proceeded to do, and that they thereafter drew by their checks said amount out of the plaintiff bank; that the Merchants' Bank never gave the Farmers' Bank any further information about said draft until June 25, 1907, when the former informed the latter that the draft had been lost, and requested a duplicate; that the Farmers' Bank asked Potts & Lynch for a duplicate, which they refused to give, and the Merchants' Bank was at once notified of such refusal; that at

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this time the Valley Lumber Company, the drawee, was solvent, and if the duplicate had been given by Potts & Lynch it would have been paid by the lumber company, if in fact it owed Potts & Lynch that amount; that as a matter of fact the lumber company was not indebted to Potts & Lynch that there were mutual accounts between said parties, and that there had been no settlement between them; and that upon a settlement between them it would have developed that the lumber company owed Potts & Lynch nothing, which fact Potts & Lynch then knew, but drew the draft and gave the same to the Farmers' Bank for the purpose of wrongfully obtaining said sum from it. Plaintiff further alleged that at the time it received said draft the Valley Lumber Company was a going concern, and did not go into the hands of a receiver until long thereafter, and that when the business of said company was finally wound up its assets paid 75 per cent. of its indebtedness; that if the said Potts & Lynch, or the Merchants' Bank, had made any effort to do so, they could have collected on said claim 75 per cent. thereof, but no effort was made in that regard by either. It further alleged that plaintiff never heard anything more from the Merchants' Bank about the draft until July 1, 1907, when plaintiff received from it a statement showing said sum of $1,500 to the credit of plaintiff, and that this credit was also shown in statements received by plaintiff from the Merchants' Bank on the 1st days of August and September, 1907; that on September 11, 1907, plaintiff received notice from defendant bank that the draft had not been collected by it from the lumber company, and that the same had been charged back to plaintiff; that it was by the combined wrongful and negligent acts of the defendants that plaintiff was wrongfully induced to pay out said sum of $1,500 to defendants Potts & Lynch; and that all defendants are therefore liable to plaintiff therefor.

The defendant Merchants' Bank, after a general denial, specially pleaded that it acknowledged to the Farmers' Bank receipt of the draft in question upon a postal card in general use by it, in which it was stated that it had received plaintiff's communication, with its stated inclosure, and that it had entered credit therefor, "out of town items subject to final cash payment." It further alleged its effort and failure to make collection of the draft, pleaded the insolvency of the lumber company, and, while claiming to have acted with due diligence, alleged that nevertheless, if there had been any negligence on its part, no injury had resulted therefrom to plaintiff, nor to Potts & Lynch, for the reason that it had tried and could not, or if it had tried it could not, have collected from the Valley Lumber Company, because of its insolvency, the amount of the draft at any time from the date of the draft to the time when the property of the lumber company was placed in the hands of a receiver.

Defendants Potts & Lynch urged a general demurrer to plaintiff's petition, and a further demurrer of misjoinder of parties defendant, because of want of privity between them, pleaded a general denial, and specially pleaded the same matters that were alleged by plaintiff in regard to the drawing of the draft, placing it with plaintiff for collection, the crediting of their account for the amount thereof, and the payment thereof to them upon their order. They further alleged that plaintiff obligated itself to collect said draft, itself or by its agents, and

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that plaintiff represented to them that the same had been collected, and that they acted in good faith in accepting said representation as true; that, if the draft was not in fact collected, the failure to collect it was the result of the negligence of plaintiff and its agents; that for more than twenty days after said draft was delivered to plaintiff the Valley Lumber Company was actively engaged in business; that if said draft had been presented within that time it would have been paid; that on or about June 25, 1907, the Valley Lumber Company was placed in the hands of a receiver, and that plaintiff failed to present said draft to said receiver for payment; that they, Potts & Lynch, had received payment of their claim against the Valley Lumber Company, and had no further claim against said company; that the assets of the lumber company were sufficient to have paid $1,000 of the claim sued on; that by failing to return the draft to them, and by representing to them the draft had been paid, the plaintiff is estopped from demanding payment of them now. They further pleaded that, had said draft not been paid, as plaintiff reported to them that it had been, and had they been notified of said non-payment, and the said draft had been returned to them, they would have presented said draft, or the claim it represented to the Valley Lumber Company, and if said claim had not been collected before the property was placed in the hands of a receiver they would have taken the necessary steps to establish their claim in the court where the receivership was pending, and would have received at least $1,000 from the proceeds of the sale of the property of the lumber company, and would have received as much as any other creditor of said company, at least 66 2-3 per cent., all of which defendants were prevented from doing by the aforesaid acts and statements of plaintiff.

The case was tried before a jury, and under a peremptory instruction from the court a verdict was returned in favor of the Merchants' Bank, and in favor of the Farmers' Bank as against the defendants Potts & Lynch, for $1,500, with 6 per cent. interest from September 11, 1907, upon which verdict judgment was accordingly entered, and from which judgment the plaintiff and the defendants Potts & Lynch have appealed.

We will first dispose of the appeal of Potts & Lynch. We may say at the outset that these appellants in their pleadings pray for judgment over against the Merchants' Bank.

[1] Their first assignment of error complains of the action of the court in refusing to sustain their general demurrer to plaintiff's petition. Their proposition under this assignment is as follows: "Inconsistent facts cannot properly be embraced in one count in a pleading; and where one bank, which had a draft drawn in its favor against a third party, and which it has sent to another bank for collection, sues the latter on the ground of negligence in failing to collect the draft, and also sues the drawers of the draft on the ground of fraud, there is no privity of causes of action, and a misjoinder of parties defendant." It has been held that misjoinder and nonjoinder of parties should be pleaded in limine, and cannot be raised by general demurrer. Hill v. Newman, 67 Tex. 265, 3 S. W. 271; Kemendo v. Fruit Dispatch Co., 131 S. W. 76. The assignment is overruled.

[2] By their second assignment appellants Potts & Lynch Complain

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that the court erred in refusing to sustain their special exception to plaintiff's petition, to the effect that these appellants were improperly joined with the Merchants' National Bank as defendants in this suit. We think this contention is without merit. This controversy between all the parties grew out of the same transaction; that is to say, the drawing of the draft, depositing it for collection with the Farmers' Bank, and the appropriation by Potts & Lynch of an amount of money placed to their credit by the Farmers' Bank upon the faith of the bona fides of Potts & Lynch in making the draft and upon that of the Merchants' Bank in using due diligence in making collection. Our courts are vested with liberal discretion in acting upon such exceptions, notwithstanding the issues raised thereby involve matters ex contractu, as well as ex delicto. Gulf, West Texas & Pacific Ry. Co. v. Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Kemendo v. Fruit Dispatch Co., 131 S. W. 76; Morris v. Davis, 31 S. W. 850. In the Kemendo case it is said: "It is held in Hooks v. Fitzenrieter, 76 Tex. 277 [13 S. W. 230], and in N. Y. L. S. v. Rohrbough, 2 Willson, Civ. Cas. Ct. App. § 216, that the right to sue for the breach of a contract and tort, when both grow out of the same transaction, is recognized by our courts." The assignment is overruled.

What we have said in disposing of the second assignment of error sufficiently disposes of the fourth and sixth, each of which is overruled without further comment.

Their ninth assignment is as follows: "The court erred in delivering to the jury the peremptory instruction in favor of the plaintiff against these defendants, because under the pleadings and the testimony no such instructions were demanded or authorized." The evidence in the record justifies the following findings:

June 3, 1907, Potts & Lynch, engaged in business at Neuville, Shelby county, Tex., drew a draft for $1,500 on the Valley Lumber Company, also engaged in business in Neuville, in favor of the Farmers' National Bank of Center, and on said date presented said draft to said bank, with instructions to send it to the Merchants' National Bank of Houston for collection. This instruction was complied with; the Farmers' Bank on the same day forwarding the draft by United States mail to the Merchants' Bank, and it was received by the latter on June 5, 1907. The Merchants' Bank at once acknowledged receipt of the draft by postal card, using for this purpose a card in general used by it; the acknowledgment, together with matter printed upon the card, being as follows: "Your favor of the 3d is received with stated inclosures. We enter for credit (out of town items subject to final cash payment) $1,500." "All items not payable in Houston, received by this bank, for credit or collection, are taken at owner's risk. This bank, as agent of the owner, will forward same to collecting agents out of this city; but should such collecting agents convert the proceeds, or remit in checks or drafts which are thereafter dishonored, the amount for which such credit has been given will be charged back. This bank assumes no responsibility for neglect or default of collecting agents." The language last quoted was printed upon the margin of the card.

At the time of mailing this card to the Farmers' Bank, the Merchants' Bank also mailed a letter to the Valley Lumber Company at

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Neuville, notifying it that the bank held the draft for collection and requesting immediate payment of the same. Receiving no reply to this demand, the bank, after waiting a few days, renewed its demand for payment. On June 3 and 4, 1907, one Curry, who was general manager of the Valley Lumber Company, left Neuville without placing any one in charge of the plant and business of his company. About June 10th he wrote to O. S. Wooley, who had general charge of the "outside business" of the lumber company, to take general charge of the affairs of said company, whereupon Wooley did take charge of the office, books, papers, and general affairs of the company, and it was then that he found in the office of the company an unopened letter, which proved to be the demand by the Merchants' Bank upon the lumber company for the payment of the Potts & Lynch draft. This demand could not have reached the lumber company earlier than June 7th. Wooley did not pay the draft, because he said he lacked authority, and because at that time the lumber company was in financial difficulties, so much so that on June 15th, five days after he opened the bank's letter containing the demand, a suit against the lumber company was instituted, in which the appointment of a receiver was prayed for, and which prayer on said date was granted, and Wooley named by the court as receiver. He did not qualify as such, however, until July 10, 1907; but he testified that on June 10th, when he took charge of the company's office and found the letter demanding payment of the draft, "there was nothing doing." The receivership was not finally wound up and the receiver discharged until January 28, 1908. The assets of the lumber company paid 42 per cent. of all debts properly proved up by the creditors.

When the Farmers' Bank received acknowledgment from the Merchants' Bank of receipt of the draft, it so notified Potts & Lynch and at once placed the amount of the draft to Potts & Lynch's credit, and authorized them to draw against it in the ordinary course of business. At that time, however, Potts & Lynch were due the bank $500 on overdrafts, and this amount was first discharged from the $1,500 placed by the bank to their credit, leaving a net balance to the credit of their account of $1,000, which amount was subsequently drawn and used by Potts & Lynch as their business needs required.

On June 25, 1907, the Merchants' Bank wrote to the Farmers' Bank as follows: "On the 4th inst. you sent us a draft for $1,500, drawn by Potts & Lynch on the Valley Lbr. Co., Neuville, Texas. We advised the Valley Lbr. Co. that we held the draft, and did not hear from them definitely until recently. The draft has been misplaced by the collection boy, and we are unable to locate it. Please advise us if you can secure a duplicate draft, and we will present again, or whether Potts & Lynch can settle the matter with the Valley Lbr. Co. without drawing a draft on them." Upon receipt of this letter the Farmers' Bank requested Potts & Lynch to make a duplicate draft; but they declined to do so, on the ground that they had already received the amount of the draft and were no longer concerned in the matter.

When the Merchants' Bank received the draft for collection on June 5th, it at once entered the amount thereof to the credit of the account of the Farmers' Bank, and in monthly statements sent by the

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former to the latter on the 1st days of July, August, and September, 1907, showing the condition of its account, this sum was shown to be credited to the account of the Farmers' Bank. On September 11, 1907, the amount was charged back, and the Farmers' Bank was so notified. It was shown that neither Potts & Lynch, nor the Farmers' Bank, nor the Merchants' Bank, proved up and presented to the receiver for payment any claim for any amount due Potts & Lynch.

At the time the Farmers' Bank received notice from the Merchants' Bank, June 25th, that the draft had not been paid and had been lost, and to procure a duplicate draft, Potts & Lynch had drawn all of the amount to their credit in the Farmers' Bank, except a small balance, and this they were thereafter in a short time permitted to withdraw.

[3] While we have found as a fact that at the time Potts & Lynch presented the draft to the Farmers' Bank they instructed that it be sent to the Merchants' Bank for collection, no such averment is made by the pleadings of any of the parties; but, on the contrary, all of them directly or by fair intendment alleged that the draft was deposited by the drawers in the Farmers' Bank for collection, and that the act of that bank in sending it to the Merchants' Bank was its voluntary act, and not the result of directions given by the drawers. It has been held that where the drawer, at the time of depositing a draft with a bank, directs that the draft be sent to a particular bank for collection, the latter is thereby constituted the agent of the depositor, and not of the forwarding bank, and in such case the forwarding bank is not liable for the default or negligence of the bank selected by the depositor to make the collection. First National Bank v. Quimby, 131 S. W. 429; Schumacher v. Trent, 18 Tex. Civ. App. 17, 44 S. W. 460. In view of the pleadings of the parties, however, this issue was not raised, and the case must be treated, therefore, as if no such proof was made.

[4] The question then arises: Do the facts stated make out a case in favor of the Farmers' Bank against Potts & Lynch? Or, in other words, do the facts authorize a judgment in favor of Potts & Lynch? An answer to this question depends on whether the Farmers' Bank, in handling the draft, used ordinary diligence in trying to make the collection. It is not contended that, by sending the draft to the Merchants' Bank at Houston for collection, instead of attempting to collect directly from the drawee, the Farmers' Bank departed from the ordinary business methods in making collections, or that this method involved a want of ordinary diligence. The testimony leaves no doubt that the forwarding bank acted with reasonable promptness in forwarding the draft to its correspondent in Houston, and that the latter also acted with reasonable promptness in making demand for payment. Nor was it shown that the Merchants' Bank was guilty of any negligence in not presenting its demand after it was first made; for the testimony shows that a second demand was made about a week later, and that before this time the Valley Lumber Company had become so financially involved that a collection from it by the ordinary methods adopted by banks could not have been made. Up to this time we think that the Merchants' Bank, as the agent of the Farmers' Bank, had acted with due diligence in making the collection, and after this the insolvency of the Valley Lumber Company was such

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that whatever diligence of any degree might have been exercised in the attempt to collect the draft would have been futile. No actionable negligence of either bank in the regard discussed having been shown, it was not error for the court to instruct a verdict for the Farmers' Bank against Potts & Lynch.

[5] It will be remembered that, as soon as the Farmers' Bank received notice that the draft had been received by the Merchants' Bank, it at once entered the amount of the draft to the credit of Potts & Lynch, and permitted them to check it out in ordinary course of business. This was nothing less than an advancement or loan to Potts & Lynch on the faith of the payment of the draft, and, the draft remaining unpaid through no fault of the bank, left Potts & Lynch its debtors to the extent of the amount so advanced. Thus far we have not discussed the question of liability of the Farmers' Bank to Potts & Lynch, growing out of the matters pleaded by the latter, for the alleged negligence of the former in informing them that the draft had been paid, and in not informing them of the noncollection of the draft in time to allow them to present their claim to the receiver, and thus collect their proper proportion of the debt owing them by the lumber company. Indeed, this question is not presented in this connection, but is only presented in connection with the assignment relating to the exclusion of certain testimony, which we will hereafter pass upon. In view of the record as presented to us, and on the evidence admitted by the court, there was no error in giving the peremptory charge complained of, and the assignment is overruled.

[6] Appellants Potts & Lynch's seventh assignment of error is as follows: "The court erred in refusing to allow these defendants to introduce the witness W. C. Potts, who would have testified that these defendants, before drawing of the draft mentioned in plaintiff's petition, had a just, due, and unpaid claim against the Valley Lumber Company for $1,500, and that they drew this particular draft on the Valley Lumber Company in plaintiff's favor by reason of this claim, afterwards received payment of the draft, and the information from the plaintiff that the Valley Lumber Company was placed in the hands of a receiver, but that they had no claim against it, and made no effort to present any claim, because of the payment of said draft and the information given them by the plaintiff, upon which they relied, that the Valley Lumber Company had paid said draft; that Potts & Lynch would have presented their claim to the receiver of the said Valley Lumber Company, and would have had it approved, and would have collected such portion of their claim as was in fact paid to creditors, which was not less than 42 per cent., had they not been informed that this particular draft had been paid, which said testimony was excluded upon objections of the plaintiff, all of which is shown by the bill of exception No. 5."

The issue of negligence of plaintiff in not informing these appellants of the noncollection of the draft in time to allow defendants Potts & Lynch to present their claim to the receiver for allowance before the close of the receivership, and their loss in consequence, was raised by their pleadings. The bill of exceptions referred to shows that the testimony offered and rejected was substantially as stated in the assignment. If in fact the Farmers' Bank informed Potts &

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Lynch, and they were thus led to believe, that their draft had been paid by the lumber company, and if they had been seasonably informed that the draft had not been paid, they would have taken such steps as would have resulted in the collection from the receiver of 42 per cent. of their claim, and they were not so informed, we see no reason why they would not be entitled to a judgment against the bank for this amount in set-off to the claim of the bank for the amount advanced by the bank to them. We think the refusal of the court to allow the testimony was error, for which the judgment in favor of plaintiff against Potts & Lynch should be reversed.

We will not discuss the other assignments of error presented by appellants Potts & Lynch, for to do so would extend this opinion, already too long, beyond all reasonable bounds. It is sufficient, we think, to say that we have examined all their assignments of error, and, with the exception of the seventh, find no reversible errors in any of them.

[7] We come now to a consideration of the only assignment of error presented by appellants Farmers' National Bank, which is as follows: "The court erred in giving to the jury peremptory instructions to find for defendant bank; the undisputed evidence showing that the said defendant Merchants' National Bank was guilty of gross negligence in handling the draft given by defendants Potts & Lynch to the plaintiff for the sum of $1,500, and that by reason of said negligence on the part of said defendant bank the plaintiff was induced to pay out to defendants Potts & Lynch the said sum of $1,500."

What we have said in disposing of the ninth assignment of appellants Potts & Lynch, which complains of the giving of the peremptory instruction, practically disposes of this. As before shown, the Merchants' Bank acted with reasonable promptitude in its effort to collect before the lumber company became insolvent, and that thereafter the utmost diligence would have been unavailing. It is not true, as stated in the assignment, as has been hereinbefore shown, that the Farmers' Bank was induced to pay the $1,500 to Potts & Lynch through any negligence on the part of the Merchants' Bank; for it was indisputably shown by the evidence that the Farmers' Bank placed said amount to the credit of Potts & Lynch as soon as it was advised that the draft had been received by the Merchants' Bank for collection, and permitted Potts & Lynch to draw on this amount without waiting for results from an attempt to collect it. It was apprised by the letter written by the Merchants' Bank to it on June 25th that the draft had not been paid, and at this time Potts & Lynch had withdrawn the entire sum so placed to their credit, with the exception of a small balance, which they were thereafter permitted to withdraw. Just what this balance was the evidence does not disclose. The fact that the statements sent by the Merchants' Bank to plaintiff bank on the 1st days of July, August, and September, 1907, showing this sum as a credit to the latter's account, did not and could not affect the plaintiff bank to its prejudice, because it had paid the amount of the draft to Potts & Lynch before the first of the statements was received by it. The undisputed evidence shows that the Farmers' Bank had notice of the nonpayment of the draft in ample time before the close of the receivership to have presented the claim to the receiver,

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secure its approval, and collect the per cent. paid to the Valley Lumber Company's creditors. We think that the assignment and all propositions thereunder must be overruled.

The judgment of the court below in favor of the Merchants' National Bank is affirmed; and, because of the error indicated, the judgment in favor of the Farmers' National Bank against Potts & Lynch is reversed, and the cause remanded.

Affirmed in part. Reversed and remanded in part.

Decision No. 1395.

BRYNE v. BRYNE.

(Supreme Judicial Court of Massachusetts. Suffolk. May 18, 1911.)

95 N. E. 88.

BILLS AND NOTES.

An instrument, "Borrowed and received from G. M. B. five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.," signed by J. L. B., is a nonnegotiable promissory note; the word "payable" imparting a promise to pay the sum stated at the time fixed.

The question whether the instrument sued on was a promissory note was one of law for the court, and evidence that it was intended as a memorandum merely was rightly excluded.

Exceptions from Superior Court, Suffolk county; George A. Sanderson, Judge.

Action by George M. Bryne against James L. Bryne. Case transferred from the Superior Court on exceptions to an instruction and to rulings in directing a verdict and on the exclusion of evidence. Exceptions overruled, with double costs.

The following is a copy of the note sued on:

"George M. Bryne
"Contractor for Public Works
"Room 802

"Boston, Mass., September 3, 1903.

"7 Water Street.

"Borrowed and received from George M. Bryne, five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.

"[Signed] J. L. Bryne."

J. T. Auerbach, H. S. MacPherson, and J. B. Mahar, for plaintiff. J. E. Crowley and D. T. O'Connell, for defendant.

MORTON, J. (1) It is plain, we think, that the instrument declared on is a promissory note. It is not a negotiable promissory note and is not declared on as such. The word "payable" in the connection in which it occurs imports a promise by the

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maker to pay at the time fixed the sum named. The promise is not one implied by law from an acknowledgment of indebtedness, but is the maker's own promise. It is not contended that the other elements necessary to constitute a promissory note are not included in the instrument declared on. See Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Mitchell v. Rome R. Co., 17 Ga. 574; Carver v. Hayes, 47 Me. 257; Stagg v. Pepoon, 1 Nott & McC. (S. C.) 102; Cowan v. Hallack, 9 Colo. 572, 13 Pac. 700; Waithman v. Elsee, 1 C. & K. 35; Richer v. Noyer, L. R. 5 P. C. 461, 466, 476.

(2) The question whether the instrument was or was not a promissory note was one of law for the court, and evidence that it was intended by the defendant as a memorandum merely was rightly excluded.

Exceptions overruled, with double costs and interest at 12 per cent.

Decision No. 1396.

EQUITABLE TRUST CO. OF NEW YORK v. NEWMAN.

(Supreme Court, Appellate Term. May 4, 1911.)

129 N. Y. Supp. 259.

BILLS AND NOTES — NEGOTIABILITY — INSURANCE.

An instrument in the form of a letter from N. to H., general agent of a life insurance company, acknowledging receipt from S. of a policy on N.'s life, authorizing H. to place the policy in force from date of letter, and concluding, "I promise to pay you or your order the first annual premium, amounting to . . . as follows," is to be treated as not intended to be a present unconditional engagement, but as conditional on the agent performing his part of the contract, and so is not a negotiable instrument.

A contract to pay a certain amount as premium for a life policy, rebate of part of the premium being provided for, cannot be enforced; N. Y. Insurance Law, § 89, prohibiting rebating, being in force when the contract was made, and giving rebates being made a misdemeanor by N. Y. Penal Law, § 1191.

Appeal from City Court of New York, Trial Term.

Action by the Equitable Trust Company of New York against Charles A. Newman. From a judgment on a verdict directed for plaintiff, and from an order denying a motion for a new trial (69 Misc. Rep. 494, 127 N. Y. Supp. 243), defendant appeals. Reversed, and new trial granted.

Argued before SEABURY, LEHMAN, and GERARD, JJ.

Kauffman & Herzberg (Leon Kauffman and Joseph Herzberg, of counsel), for appellant.

McLear & McLear (Robert E. McLear, of counsel), for respondent.

LEHMAN, J. The plaintiff has brought suit, alleging that it is the holder for value of a note made by the defendant. The answer con-

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tains a general denial and several affirmative defenses, setting forth that the instrument was signed and delivered to an agent of the general agent of the Equitable Life Assurance Society, upon his promise to allow the defendant a rebate of $234, and his promise to have the said policy canceled after its issuance.

At the trial the plaintiff introduced in evidence the following instrument:

"New York, December 19, 1903.

"Mr. Archibald C. Haynes, General Agent, The Equitable Life Assurance Society, No. 25 Broad Street, N. Y. — Dear Sir: I hereby acknowledge having received from Mr. Geo. Schlesinger policy No. 1,288,163, being for $20,000, on my life, in the Equitable Life Assurance Society. You are authorized to place the said policy in force from this date, and I promise to pay you or your order the first annual premium, amounting to $634.60, as follows:

Cash paid to George Schlesinger	$234.60
April 15th, 1904	200.00
Sept. 15th, 1904	200.00
	$634.60

"Very truly yours, Charles A. Newman."

And he gave testimony that it was a holder for value. The defendant then tried to show that at the time the instrument was signed and delivered the agent promised to allow him a rebate of $234, and that this amount was credited on the amount payable under the instrument. This evidence was excluded, on the ground that it tended to vary a written instrument, and that in any event no such defense would be available against a holder for value of a negotiable instrument.

Upon a motion to set aside the verdict the trial justice rendered a careful decision, sustaining his view that the instrument constitutes a negotiable instrument. See Equitable Trust Co. v. Newman, 69 Misc. Rep. 494, 127 N. Y. Supp. 243. But in spite of the authorities cited therein I am unable to concur in his conclusion. Those authorities, when analyzed, merely hold that, where an unconditional promise to pay is coupled with a statement of the circumstances out of which the indebtedness arose or of the consideration for the indebtedness, such statement does not render the promise to pay conditional, or deprive an instrument having all the elements of a negotiable instrument of its negotiable character. The principle underlying all these cases is well set forth in the case of Davis v. McCready, 17 N. Y. 230, at page 232, 72 Am. Dec. 461:

"If one will issue his negotiable paper and send it into the world in consideration of an engagement of the party with whom he deals to do some act for his benefit in future, he declares in effect that he will pay the note or bill according to its terms to any one who shall become the holder for value in the course of business and rely for his own indemnity upon the promise he has received as the consideration for issuing it."

(1) The mere fact that an instrument in negotiable form, promising absolutely to pay a sum of money, contains a statement of a future consideration, does not render the promise conditional upon the due

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performance and receipt of the future consideration. In this case, however, the instrument signed by the defendant is in the form of a letter, and not of a note. It recites the receipt of a policy of insurance, and gives the agent authority to make the policy effective, and by fair construction it is not intended to be a present unconditional engagement, but is conditional upon the agent performing his part of the contract. While no special form is necessary to render an instrument negotiable, in this case the fact that the instrument is not in the usual form of mercantile paper, and does not appear to have been intended to pass as such, must be considered upon the question of whether the defendant intended to make an unconditional promise, and is one strong point of difference from the cases relied on by the respondent. It seems to me that, when the defendant signed this contract, he simply agreed to reimburse the general agent for advance payment of premium, and that any person reading the instrument could well understand that its sole intent was to embody in writing the defendant's future obligation under the contract with the agent, and that this obligation, as in other executory contracts, was dependent upon due performance by the other party.

(2) The respondent claims that, even if the instrument was not negotiable, proof that the agent agreed to give the defendant a rebate of $234 would constitute no defense as between the original parties. At the time the letter was signed and the contract was made rebating was forbidden under section 89 of the Insurance Law. That section did not in terms declare a contract for a rebate void, but the act of giving rebates was made a misdemeanor by chapter 282 of the Laws of 1889, now section 1191 of the Penal Code, and the courts should not enforce a contract which is not only forbidden by the statute, but which constitutes a penal offense. Section 89 does not, as claimed, provide a specific penalty for giving a rebate, which should be considered exclusive. It simply provides the manner in which the Superintendent of Insurance may restrain future disobedience. The agent could not enforce the contract, and his assignee takes subject to all the defenses against him.

Judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

Decision No. 1397.

STITZEL et al. v. MILLER.

(Supreme Court of Illinois. April 19, 1911.)

95 N. E. 53.

BILLS AND NOTES — NEGOTIABILITY — INDORSEMENT — EVIDENCE.

A provision in a note that, if not paid at maturity, the holder may at his option extend the time of payment thereof, does not render the note nonnegotiable, under the Negotiable Instruments Act, which requires that a note to be negotiable must be a written promise by one person to pay to another named, or order, a fixed sum at all events and at a time specified therein, or at a time which will certainly arrive.

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The indorsement of the name of the payee on the back of a note and the sale and delivery thereof to another authorizes the latter to sue thereon in his own name.

The genuineness of a signature may not be proved by comparison with other admittedly genuine signatures not admissible in evidence for other purposes, or not already a part of the record, but, where other signatures admitted to be genuine are already in the case, comparison may be made by the jury, with or without experts.

One who has seen another write, or who has acquired a knowledge of the other's handwriting by correspondence or otherwise, may testify to the genuineness of the latter's handwriting.

The rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine signatures not admissible in evidence for other purposes, or not already a part of the record, must be liberally construed, so as to serve as an aid in determining the genuineness of signatures; and the reason of the rule is founded on the danger of the selection of a false standard as the characteristic type of handwriting, and bringing before the jury collateral issues.

Where the issue is the genuineness of the marker's signature to a note, other notes bearing his signature are admissible to show that the signatures thereon and the signature on the note in issue are fac similes, to show that the disputed signature must have been traced from another signature by some process, and thus prove forgery.

That two signatures are exactly alike is evidence that one was traced or otherwise reproduced from the other, or that both were made from still another signature.

The authorship of a writing may be proved by the character of spelling or style of composition, and the proof of such peculiarities may be made in any way that is appropriate in other cases.

A photographic copy of an instrument which cannot be produced in court is admissible on preliminary proof of the accuracy of the photograph.

Where writings are admissible to aid in deciding whether they are fac similes of a writing, the genuineness of which is in dispute, expert testimony is permissible.

An heir may not by admissions or statements bind his coheirs.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Lee County; R. S. Farrand, Judge.

Action by George B. Stitzel and others against Loren B. Miller, administrator of D. C. Miller, deceased. From a judgment of the Appellate Court affirming a judgment for plaintiffs and granting a certificate of importance, defendant appeals. Reversed and remanded.

Trusdell, Smith & Leech, for appellant. H. A. Brooks, for appellees.

CARTER, J. This is a suit in assumpsit brought by appellees in the Circuit Court of Lee county against appellant upon a promissory note dated February 22, 1908, payable one year after date to Harrison Miller and by him indorsed in blank and sold and delivered to appellees. This note was for the principal sum of $6,500, with interest at 6 per cent., and purported to be signed by D. C. Miller. The appellant filed a special demurrer, charging that the suit was permaturely brought, and the note non-negotiable. On the demurrer being overruled the appellant pleaded non-assumpsit, with a verification denying execution of the instrument. Upon a jury trial appellees obtained

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a verdict for $7,140.25. From the judgment entered thereon an appeal was prayed and allowed to the Appellate Court for the Second District. The court affirmed the judgment of the trial court and granted a certificate of importance. This appeal followed.

The original instrument sued on has been certified to this court. A printed blank prepared for the Stocking Trust & Savings Bank was used in making it. Everything is in print except the date, names, amount, time when payable and the rate of interest. The first part is printed in large type, and is the ordinary form of promissory note. A power of attorney to confess judgment follows in fine print, and thereafter, in like print, the following: "We also agree that in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof."

(1) It is urged that the quoted words render the instrument non-negotiable. This court has held that a promissory note "may be defined to be a written promise by one person to pay to another person therein named, or order, a fixed sum of money at all events and at a time specified therein or at a time which must certainly arrive." McClenathan v. Davis, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017. This definition substantially meets the requirements of the Negotiable Instruments Act of 1907. The contention that said quoted words gave the holder the authority to extend the note as he pleased, that it could not be known what extensions he might grant, and that, therefore, the time when the note became due and payable was uncertain and indeterminate, rendering the note non-negotiable, cannot be sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity. The time of payment is certain. The note is dated February 22, 1908, and payable on year thereafter. After a note is due its negotiability, for all practical purposes, is at an end. In Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99, it was held that a provision in a note that, if it was not paid when due and suit was brought thereon, the maker should pay an attorney's fee of 10 per cent., recoverable either in such suit or a separate action, did not destroy the negotiability of the note as it did not take effect until after maturity. Numerous authorities are cited from this and other States by counsel for appellant on this question. In most of them the note recites that the payee reserves the right of option of extension at any time, either before or after maturity, and we do not consider them in point. The quoted words do not affect the character of the note, before or up to its maturity, either in its certainty, amount to be paid, the date of payment or the person to whom the payment is to be made. The clause in question does not destroy the negotiability of the note. The following authorities in other jurisdictions tend to uphold this conclusion: National Bank v. Kenney, 98 Tex. 293, 83 S. W. 368; First Nat. Bank v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, and note; Farmer, Thompson & Helsell v. Bank of Graettinger, 130 Iowa 469, 107 N. W. 170; Anniston Loan & Trust Co. v. Stickney, 108 Ala. 146, 19 So. 63, 31 L. R. A. 234, and note.

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(2) The note being negotiable, the indorsement of the name of the payee on its back and its sale and delivery to appellees authorized them to maintain this action in their own names. Kistner v. Peters, 223 Ill. 607, 79 N. E. 311, 7 L. R. A. (N. S.) 400, 114 Am. St. Rep. 362; Keenan v. Blue, 240 Ill. 177, 88 N. E. 553.

(3, 4) The note matured February 22, 1909. The suit was begun December 19, 1908. The first summons not being served, a second was issued January 23, 1909, and served March 10th of the same year. It is insisted that the suit was prematurely brought. Without question there cannot be any recovery on an ordinary common-law action if the money is not due at the institution of the suit. Bacon v. Schepflin, 185 Ill. 122, 56 N. E. 1123, and cases cited; 1 Ency. of L. & P. 1082. We think this question was not properly preserved for review.

(5) It is further insisted that the trial court erred in refusing to admit certain other notes to be introduced in evidence for the purpose of showing that the signatures thereon and the signature on the note at issue were fac-similes. The evidence shows that Harrison Miller and Lafayette Miller were nephews of D. C. Miller, deceased; that appellees purchased the note in this suit from Harrison Miller, and at the same time bought of him another note for $4,500, also dated February 22, 1908, purporting to be executed by Lafayette Miller and D. C. Miller, payable to the order of Harrison Miller and by him indorsed. Evidence was also offered tending to show that a suit had been brought in the District Court of Scott county, Iowa, by L. C. Miller against Ella Quinn, executrix of the estate of James Quinn, deceased, upon a promissory note dated at Davenport, Iowa, September 14, 1907, for the sum of $15,000, purporting to be executed by James Quinn and payable to the order of D. C. Miller, bearing upon the back thereof the purported indorsement in blank of D. C. Miller; that in a trial in said District Court of Iowa as to said note the purported signature of D. C. Miller on the back was shown to be a forgery; that appellant had asked, but had been refused leave to withdraw said note from the files of that court for use in this trial; that a correct photographic copy, of natural size, had been procured of this note and the back thereof; that on the trial of said case in Iowa the testimony showed that the writing filling up the blanks on the face of that note was in the hand of Harrison Miller. Counsel for the appellant offered said $4,500 note and the photograph of the $15,000 note in evidence, and offered to prove by an expert that the purported signature of D. C. Miller on the note here in question, and on said $4,500 note, and on the back of the $15,000 note (as shown by the photograph), were identical in every particular, and if superimposed, would exactly coincide. The court refused to permit this evidence to be introduced. It is insisted that, if these facts had been shown, the conclusion would necessarily have been drawn that the three alleged signatures of D. C. Miller were all tracings from the same signature. This court has laid down the rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures not admissible in evidence for other purposes or not already a part of the record. When, however, other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury, with or

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without experts. Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393; Bevan v. Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Brobston v. Cahill, 64 Ill. 356; Jumpertz v. People, 21 Ill. 375; Massey v. Farmers' Nat. Bank, 104 Ill. 327.

(6) Counsel for appellant strenuously insist that the offered evidence does not come within the reasoning of the decisions in this State; that this rule against comparison of handwriting only applies where it is sought to show that a signature is like the typical signature of another. A witness who has seen another write is competent to testify, as is also one who has acquired a knowledge of the other's handwriting by correspondence or in the ordinary course of business. 2 Jones on the Law of Evidence, §§ 559, 561; 1 Greenleaf on Evidence (Lewis' Ed.), § 577. In a sense all evidence of handwriting is in the nature of comparison, except where the witness saw the act of writing. The general rule of the common law was that proof of handwriting by comparison, by placing the documents in juxtaposition, was not permissible. There were, however, two exceptions that were as well recognized as the rule itself: First, where writings otherwise irrelevant, offered for the mere purpose of comparison, were admitted when the writing in issue was so ancient as not to admit of proof from knowledge derived from seeing the party write; and, second, where other writings were legitimately in the case for other purposes. 15 Am. & Eng. Ency. of Law (2d Ed.) 265; 3 Wigmore on Evidence, § 1991; 1 Greenleaf on Evidence (Lewis' Ed.) § 578. The tendency of legislation, as well as of judicial decisions, is to relax this rule, and to enlarge upon its exceptions, or, rather, to permit a more liberal use of comparison with any writing established to be the writing of the party whose handwriting is in issue, whether the writing is otherwise relevant or not. The rule has been so enlarged in England by statute in 1854 and also by statute in various States in this country. 15 Am. & Eng. Ency. of Law (2d Ed.) 265, 269. See an exhaustive review of this subject in note to University of Illinois v. Spalding, 71 N. H. 163, 51 Atl. 731, 62 L. R. A. 817. The reason generally given for permitting a comparison with writings already in evidence is that it is better to permit the jury to use such papers for this purpose, under proper instructions, than to confuse them with impracticable distinctions as to their use. The objections originally urged for rejecting proof by comparison of hands were three in number, namely: (1) Illiteracy of jurors; (2) danger of fraud and bias in the selection of a standard of comparison; (3) danger of multiplicity of collateral issues arising from necessity of making proof of the genuineness of the standard. The first objection has long been obsolete. 3 Wigmore on Evidence, § 2002.

Assuming that counsel for the appellees is right in contending that this evidence would involve the principle of a comparison of handwriting, would its admission be in conflict with the decisions of this court on this question? This court has never decided the precise issue here raised, and so far as we are advised the rule insisted upon by appellees has never been enforced where the facts were similar to those in this case. Indeed, in the record that we have of the celebrated Howland Will Case, 4 Am. Law Rev. 625, the trial court there

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seems to have gone much further in the admission of evidence bearing on traced or forged signatures than is here contended for by the appellant. In discussing the question of the comparison of handwriting by bringing the documents into juxtaposition, Chief Justice Shaw, in Moody v. Rowell, 17 Pick (Mass.) 490, 28 Am. Dec. 317, said: "It seems to be difficult to distinguish, in principle, between the case of a paper admitted or proved to be genuine, given in evidence for another purpose, and a paper, the genuineness of which is equally well established, when offered for this express purpose. In both cases the result depends upon skill and judgment in making the comparison and discovering the resemblances and differences." The dangers arising from the admission of such papers are greatly minimized where the writings admitted are conceded by the opposite party to be genuine or he is estopped from denying them. 1 Greenleaf on Evidence, § 581. If such comparison will lead to the ends of truth and justice when the papers are admitted in evidence for other purposes, there is much force in the argument that any evils that may be suggested as arising from the selection of particular writings for the purpose of comparison may be left, as all such evidence must be, to be corrected by other evidence or the individual judgment of the jury. Morrison v. Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331. In University of Illinois v. Spalding, supra, it is said at page 169 of 71 N. H., at page 733 of 51 Atl., at page 825 of 62 L. R. A.: "It may be safely stated as a fundamental proposition that on the question whether a given signature is in the handwriting of a particular person comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities thus disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature in issue with an exemplar of the person's handwriting existing in the mind and derived from direct acquaintance, however little, with the party's handwriting." That this court concurs in this reasoning is shown in Greenebaum v. Bornhofen, 167 Ill. 640, 645, 47 N. E. 857, 859, where, in discussing the evidence as to comparison of handwriting, it was said: "In considering the issue the court might, and should, compare the signatures of the papers so in evidence, as a means of determining whether the disputed signatures were genuine. . . . Of this means of determining the truth the Appellate Court and this court are deprived. That it was a most important and valuable aid is certain. It may have afforded the most convincing proofs that the signatures were genuine."

(7, 8) While we are not disposed to overrule or set aside the holdings of this court as to the comparison of writings placed in juxtaposition, we are convinced that on reason and authority the rule should not be made more rigid. On the contrary, it should be liberally construed, so as to serve as an "important and valuable aid" in determining the genuineness of signatures. The reason of the rule is not against the comparison of the signatures in different documents by bringing them together in order to show the genuineness or falsity of the signature, but it is against the selection of a

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false standard as the characteristic type or style of handwriting and bringing before the jury collateral issues. No danger of unfairness of selection could arise from the introduction of the offered evidence. If the signatures offered are fac similes, they cannot vary. They would be like the work of a printing press or typewriter when working accurately. There would be no opportunity for an arbitrary selection, and no chance to choose between the signatures of different kinds. Only signatures that are identical can be of any value for the purpose for which these documents were offered. The proof of fac simile signatures can hardly raise collateral issues. In attempting to prove a disputed signature by a genuine typical one the standards offered may be innumerable, and each one offered must be proved to be genuine or its genuineness admitted. Not only must the standards be shown to be genuine, but their weight as evidence will depend upon whether they are typical. No such danger is liable to arise in attempting to prove fac simile signatures. The number offered must, in the nature of things, be limited.

(9) A comparison to establish a type of handwriting differs from a comparison to reach a conclusion as to whether two signatures are identical. The two methods of comparison are clearly distinguishable. In seeking to prove that signatures are identical in every respect, the object of the comparison is precisely the opposite of that usually sought. In other words, in the ordinary case of comparison it is sought, from the similarity or dissimilarity of the disputed writing compared with the genuine one, to show whether the disputed writing is genuine or a forgery, while in a case like this it is sought to prove the forgery of a signature by establishing the fact that the disputed signature is so nearly identical with other signatures that it must be a forgery — that is, that the disputed signature was traced from another by some process. The authorities generally agree that no two signatures of an individual written in a natural way will be the same in all respects. The fact that two signatures are exactly alike is accepted as strong evidence that one was traced or otherwise reproduced from the other, or that both were made from still another signature. Day v. Cole, 65 Mich. 129, 31 N. W. 823; Kemp v. Mackrill, Sayre (K. B.) 130; Hanriot v. Sherwood, 82 Va. 1; Taylor Will Case, 10 Abb. Prac. (N. S. N. Y.) 300; McDonogh's Succession, 18 La. Ann. 419; 1 Moore on Facts, § 607.

The disputed evidence did not involve the doctrine of the comparison of hands in the sense in which that rule has been followed in this State. The offered proof is similar in some respects to that which was held competent in Brooks v. Tichbourn, 14 Jur. 1122, to show that Brooks was the author of a disputed writing in which the name of Tichbourn was misspelled "Titchbourn." Other letters of Brooks were offered in the lower court in which the name was misspelled in the same way. The reviewing court said: "It was objected, however, that the mode of proof of that habit was improper, and that the habit should be proved as the character of handwriting is, not by producing one or more specimens and comparing them, but by some witness who is acquainted with it from having seen the party write or corresponded with him. But we think that is not like the case of the general style and character of handwriting. The ob-

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ject is, not to show the similarity of the form of the letters and mode of writing a particular word or words, but to prove a peculiar mode of spelling a word, which might be evidenced by the plaintiff having orally spelt it in a different way from others, or written it in that way once or oftener, in any sort of characters — the more frequently the greater the value of the evidence. For that purpose one or more specimens written by him with that peculiar orthography would be admissible."

(10) It has never been doubted that the authorship of a writing might be shown by other circumstances than the likeness or unlikeness of one handwriting to that of another, as by the character of spelling or style of composition. Such a fact does not come within the rule governing proof as to the likeness or unlikeness of handwriting. Proof of such peculiarities may be made in any way that would be appropriate in other cases. In Pate v. People, 3 Gilman, 644, the prosecuting witness, Randall, testified that a receipt and contract described in an indictment were never executed by him, and he proceeded to point out wherein the style of writing and spelling differed from his own. For the purpose of contradicting him, the prisoner introduced other papers written and signed by Randall which correspond in these particulars wtih the documents alleged to be forged. The court held that this evidence was proper, and that the prosecution then had the undoubted right to rebut this testimony and sustain Randall by showing that the papers introduced by the prisoner and traced to his possession previous to the trial were originally written as stated by Randall but had since been made to resemble the forged writings by alterations and erasures. Incriminating letters written on a typewriting machine, not signed, were offered in evidence against a defendant in a criminal case; their genuineness being shown by evidence that in the town where they were mailed a machine was found that had defects that would produce the same character of writings that were found in the letters. State v. Freshwater, 30 Utah 442, 85 Pac. 447, 116 Am. St. Rep. 853. This court has held that it was proper to prove by an expert that two instruments were written by the same person, holding that the question was not whether the two writings resembled each other, but whether, in the opinion of the expert, they were written by the same person. Rogers v. Tyley, supra.

In a prosecution under the United States statutes against the slave trade, it became necessary for the prosecution to show the citienship of the vessel employed for that purpose. The vessel had been originally owned by one Marsden and engaged in a legitimate business. Just prior to embarking in the slave trade, it appeared to have been registered in the name of one Gray. The theory of the prosecution was that Marsden was still the real owner and that Gray was a fictitious person. The prosecution sought to prove this by showing that the name "Gray" on the register was a simulated one, and not signed by Gray; that no such person as Gray lived. It was sought to prove this by introducing other signatures and comparing them with the name "Gray" signed on the register. The signatures introduced were not claimed to be genuine signatures of Gray, but were ostensibly those of other persons connected with the vessel. It

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was claimed that they were all written by the same person, and the prosecution offered testimony of experts to that effect. It was argued that the rule regarding the comparison of hands applied, and that the evidence should not be admitted. The court in overruling the objection stated that, if the purpose of the offer had been to show by comparison that the signature "Gray" was in the handwriting of defendant, it would be necessary to have in evidence, as a standard of comparison, the genuine signature of the defendant, but that the purpose there was to show the circumstance that all of these papers, ostensibly signed by different persons, were in fact written by the same person, and from this circumstance draw the inference that they were spurious, and that "Gray" had not signed the registry. United States v. Darnaud, 25 Fed. Cas. 754, No. 14,918.

In Anson v. People, 148 Ill. 494, 35 N. E. 145, it was held competent to prove in a forgery case impressions of a notarial seal to show that the impression on the instruments purported to be forged was made by that same seal. The following authorities also tend to uphold the contention that the offered evidence did not strictly involve the doctrine of comparing hands, but was a species of circumstantial evidence to be admitted for the purpose of showing a plan to forge a series of notes or papers: Blalock v. Randall, 76 Ill. 224; United States v. Chamberlain, 25 Fed. Cas. 394, No. 14,778; State v. Webb, 18 Utah 441, 56 Pac. 159; Levy v. Rust (N. J. Ch.), 49 Atl. 1017; Sudlow v. Warshing, 108 N. Y. 520, 15 N. E. 532; Tally v. Cross, 124 Ala. 567, 26 South. 912; Balcetti v. Serani, Peake's Cas. 192; 1 Wigmore on Evidence, §§ 304, 315, 318.

Fac simile signatures necessarily resemble the genuine signature of the person. Honest witnesses must testify that the handwriting is similar, and many will be constrained to testify that the purported signature is genuine. If evidence of the nature here offered be excluded, the reputed signer being dead, frequently the best evidence that could be produced to show a traced signature would be excluded. It could hardly be said that any better evidence could be offered to show that a signature was a fac simile, except that of persons who actually saw the tracing done. The admission of the testimony offered would not in our judgment conflict with the rule heretofore laid down by this court as to comparison of handwriting by documents placed in juxtaposition, and we are not disposed to extend that rule so as to preclude, under proper restrictions, this character of testimony.

(11) As we understand the record, proper proof was made that the original note for $15,000 sued on in Iowa could not be produced on this trial, and the photographic copy, preliminary proof as to its accuracy having been made, was proper evidence. Rogers on Expert Testimony (2d Ed.) 336. This photographic copy of the $15,000 note and the original note of $4,500 should have been admitted in evidence for the purpose of aiding the jury in reaching a conclusion as to whether the three signatures in question were all fac similes.

(12) These writings being admissible, expert testimony was permissible to aid in deciding as to whether they were fac similes. Rogers v. Tyley, supra; 15 Am. & Eng. Ency. of Law (2d Ed.) 276; 2 Jones on Evidence, § 570; University of Illinois v. Spalding, supra, note on page 869 of 62 L. R. A.

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(13) Evidence is found in the record of an interview by one of appellees with Loren B. Miller, the administrator, and his brother, Clark Miller, when appellees were negotiating for the purchase of the two notes of $6,500 and $4,500, to the effect that said appellee showed the notes to the two Millers and asked them if they were all right, and they made no reply. We think this evidence was incompetent and should have been excluded. The two Millers could not bind the other heirs at law by any admissions or statements they might make.

We find no error in the giving and refusing of instructions.

The judgments of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court for further proceedings not inconsistent herewith.

Reversed and remanded.

Decision No. 1398.

FIRST NAT. BANK OF ETOWAH, TENN., v. MESSER.

(Supreme Court of Georgia. April 14, 1911.)

71 S. E. 148.

BILLS AND NOTES — INDORSEMENT.

Indorsing a note in its literal sense means writing one's name on the back of the note; but where the payee of a note, payable to his order, writes his name on the face of the note under the name of the maker, and delivers the note to a third person, such signing operates to transfer the title of the note to the transferee, so as to give the latter a right to maintain a suit in his own name against the maker.

The holder of a negotiable note is presumed to be such bona fide and for value, and, unless the defendant negatives one or both of these facts, he is shut off from every defense which he might have against the payee. A plea to a suit by an indorsee against the maker, averring that such indorsee took the note with the express understanding with the payee, who indorsed it in blank, that if the maker failed to pay the same at maturity the indorser would pay it, and further averring that he has paid out a certain sum on a garnishment judgment, based on a judgment against the payee, who was the indorser, set out no defense, and should have been stricken on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Fannin county; N. A. Morris, Judge.

Action by the First National Bank of Etowah, Tenn., against J. W. Messer. Judgment of nonsuit, and plaintiff brings error. Reversed.

McCrosky, Peace & Kelsoe and Gober & Griffin, for plaintiff in error. O. R. Dupree and T. A. Brown, for defendant in error.

EVANS, P. J. The first National Bank of Etowah, Tenn., brought suit against J. W. Messer to recover an amount alleged to be due on a note, a copy of which was attached to the petition. From this copy the note appears to have been signed by J. W. Mes-

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ser, and was payable to the order of J. H. Stafford. The payee's name appeared to have been signed on the face of the note, immediately beneath the signature of the maker. In the petition it was alleged that the payee had indorsed the note to the plaintiff. The defendant filed a plea averring that "he expressly denies that the plaintiff is the bona fide holder of said note without notice, and that it ever purchased said note bona fide and in good faith, but that the same was taken by said bank with the express understanding that, if said note was not paid by defendant, the said J. H. Stafford would take it up when due, without loss to the bank, the plaintiff." The plea then proceeded to aver that the defendant had been garnished by judgment creditors of the payee, and garnishment judgments had been rendered against the defendant, which he had paid; and he prayed that he have credit on the note for the amount paid on the garnishment judgments, offering to pay the balance due on the note into court. The plaintiff demurred to the sufficiency of the plea, which demurrer was overruled by the court, and on the conclusion of the plaintiff's evidence a nonsuit was awarded. The exceptions are to the grant of the nonsuit and to the overruling of the demurrer to the plea.

(1) The ordinary and usual mode of indorsing a negotiable instrument is to write the name of the indorser upon the back of the paper. But where the payee writes his name on the face of the note under the maker's signature, the effect is to transfer the title of the note to the transferee, and the payee becomes liable as an indorser. Perry v. Bray, 68 Ga. 293.

(2) (3) An averment in a pleading is to be construed according to the full allegation. Though the plea alleged that the plaintiff was not a bona fide holder, yet the same sentence containing such allegation qualifies its legal effect by assigning as a reason why the plaintiff is not a bona fide holder that the note was taken by the bank with the understanding that, if it was not paid by the maker, the indorser would pay it when due without loss to the bank. "In ordinary indorsements the contract of the indorser is to pay the money if the parties to the instrument primarily liable thereon fail to pay according to the terms thereof." Civil Code 1910, § 4279. So that the allegation in the plea is tantamount to saying that an indorsee is not a bona fide holder of a promissory note, when such indorsee acquires the note by indorsement from the payee of the note. The averment of fact is the contract of indorsement, and the statement of its effect is but the erroneous conclusion of the pleader. The plea is insufficient to charge that the plaintiff is not a bona fide holder of the note before maturity, so as to let in any defense (not excepted by Civil Code 1910, § 4286) which the maker may have against the payee, who indorsed the note to the plaintiff. "The holder of a note is presumed to be such bona fide and for value; if either fact is negatived by proof, the defendants are let in to all their defenses; such presumption is negatived by proof of any fraud in the procurement of the note." Civil Code 1910, § 4288. Under this rule the plea was insufficient as a defense to the note, and should have been stricken on demurrer.

Judgment reversed. All the Justices concur.

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Decision No. 1399.

KERBAUGH v. NUGENT ET AL. (No. 6,983.)

(Appellate Court of Indiana, Division No. 1. June 9, 1911.)

95 N. E. 336.

BILLS AND NOTES — PAYMENT — MORTGAGES.

While a note made payable at a particular time and place does not impose on the payee or his assignee the necessity of averring or proving a demand at the time and place fixed in the note, but the payor may show readiness to pay at the time and place, the maker of the note payable at bank cannot discharge the obligation by depositing in the bank funds with which to pay the note, unless the holder has deposited the note in the bank for collection.

A provision in a real estate mortgage that, on failure of the mortgagor to pay any one of the notes secured by the mortgage at maturity, all of the notes should become due and collectible, was not in the nature of a provision for penalty or forfeiture, but was to be regarded as an agreement between the parties fixing the time and conditions on which the whole debt should mature.

Time was of the essence of a provision of a mortgage that, if the mortgagor defaulted in the payment of any one of the notes as it matured, the whole debt should mature, so that a court of equity would not relieve the mortgagor from the default, unless a valid excuse was given.

Defendant executed a mortgage securing four notes, the mortgage providing that, if any one of the notes was not paid at maturity, all of them should become due and collectible. Complainant did not deposit the first note in a bank for collection, though defendant had on general deposit there more than enough to pay the note, and accrued interest on each of the others, and on the day the note matured defendant's agent instructed the bank that it was to be used for that purpose. Defendant's agent kept a lookout for complainant during the day in order to pay the note and interest but was unable to find him, and it was not presented to the bank, either on that day, or on the next, on which complainant remained at his house practically all day, and was not seen by defendant's agent until about 5 o'clock in the afternoon, when he went to the office of an attorney and consulted him about his rights as to the note and mortgage. On the next day complainant presented the note for payment at the bank, and was informed that defendant had on deposit enough money to pay the note and interest, but that the bank had no authority to make payment, but that defendant's agent could draw a check to do so, whereupon complainant directed foreclosure proceedings for the whole debt, and, when defendant's agent saw complainant later on the same day, complainant refused to accept payment except of the entire debt, whereupon defendant deposited the money in court as a tender. Held, that complainant's failure to receive payment was due to his own efforts to avoid it, and that he was therefore not entitled to foreclose the mortgage for the whole debt.

Appeal from Circuit Court, Boone county; S. R. Artman, Judge.

Action by Justus Kerbaugh against Thomas Nugent and others. Judgment for plaintiff for less than the relief demanded, and he appeals. Affirmed.

Darnell & Darnell and S. M. Ralston, for appellant. Terhune & Adney, for appellees.

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HOTTEL, J. Action by appellant against appellee on four promissory notes of $1,000 each, and to foreclose a mortgage given to secure the same. The mortgage contains a provision "that, upon the failure to pay any one of said notes at maturity, then all of said notes are to become due and collectible." An alleged default in this provision gives rise to this suit. The complaint is in one paragraph and contains the customary averments of a complaint on a series of notes and the foreclosure of mortgage given to secure the same, with the added averments that the mortgage in suit contained the provision above quoted, and that the appellee failed to pay the first note at maturity. An affirmative answer in one paragraph was filed, to which there was a reply in general denial. On the issues thus formed, there was a trial by the court and a special finding of facts and conclusions of law, to each of which appellant at the time excepted. Appellant filed a motion for new trial, which was overruled and exceptions saved, and thereupon the court rendered judgment for appellant in the sum of $1,248, and for appellee for costs, and that appellant "take nothing by his action on foreclosure of mortgage herein."

The errors assigned and relied upon by appellant are: (1) The court erred in its first conclusion of law. (2) The court erred in its second conclusion of law. (3) The court erred in overruling appellant's motion for a new trial.

The answer filed by appellee admits the execution of the note and mortgage sued upon, but avers affirmative facts in the way of present ability and readiness to pay at the time and place fixed in the notes, and a tender before suit of the amount due on the first note and interest on the others. The averments of this answer upon the questions here involved are substantially the same as the facts found by the court in its special finding of facts hereinafter set out; and, inasmuch as no question as to the sufficiency of this answer is presented to this court by any assignment of error, we deem it unnecessary to extend this opinion by a copy of the same. In this connection, however, it should be observed that appellant's counsel are now insisting that the answer filed was only in abatement and not in bar of the action, and is bad because it purports to answer the entire complaint and in fact answers but a part. But, as above indicated, the insufficiency of this answer is not presented to this court by any assignment of error, and, in any event, the finding of facts being in substance the same as the averments of the answer, the same question arises on the exceptions to the conclusions of law on the facts specially found, and in such case the sufficiency of the pleading is not important. Scanlin v. Stewart et al., 138 Ind. 574, 575, 37 N. E. 401, 38 N. E. 401; Woodward et al. v. Mitchell et ux., 140 Ind. 406, 407, 408, 39 N. E. 437; Smith, Trustee, et al. v. Wells Mfg. Co., 148 Ind. 333, 335, 46 N. E. 1000; Lake Erie, etc., R. Co. v. Hoff, 25 Ind. App. 239, 242, 243, 56 N. E. 925.

A correct understanding of the questions presented by the appeal necessitates a statement of the substance of the special finding of facts and the conclusions of law thereon. The findings, after finding all the facts with reference to the ownership by appellant of certain flouring mill property in Boone county, its description and sale to

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appellee, and the execution by appellee of the notes in suit in payment therefor, and the execution of the mortgage in suit given to secure the same, the finding setting out in full a copy of each of the notes and mortgage, which copy contains the provision heretofore set out in this opinion, then proceeds, in substance, as follows: That said notes, with the accrued interest thereon, amount to the sum of $4,274.66, and a reasonable attorney's fee for their collection is $250; that by the terms of said note they were each payable at "the Citizens' State Bank at Jamestown, Indiana;" that said note, falling due on said 25th day of February, 1908, was at no time deposited at said bank; that appellant was absent from the town of Jamestown during all of said day until after 10 o'clock that night; that on said day the defendant had upon general deposit in said Citizens' State Bank, subject to check, over $1,250 in money, being more than enough to pay the note falling due on said day, with accrued interest thereon, and one year's interest upon each of the other three notes; that appellee on said day, and prior thereto and since has, resided in the city of Washington, Daviess county, Ind., and was conducting his milling business in the town of Jamestown by and through one Henry Turner, his agent, all of which was well known to the plaintiff on said day and long prior thereto; that one week prior to said day said Turner, as the agent of appellee, in a personal conversation with appellant, ascertained when the first note would be due and the amount that would be due as principal and interest on said note, and the interest on the other three notes, but did not at that time learn that said notes were payable at said bank; that prior to said day appellee had notified said bank that so much of his general deposit in said bank as was necessary for that purpose was to be applied to payment of plaintiff's note and interest, and at said time arranged to secure additional money from said bank with which to conduct his business, if necessary; that on said date said Turner, as agent of appellee, went into said bank and ascertained the amount of money that appellee then had on deposit in said bank, and informed the officers of said bank that there was sufficient money of appellee on deposit to pay the note and interest due appellant, and that he would have a surplus remaining; that appellee's place of business was near said bank, being three minutes' walk therefrom, and his business was immediately across the street and about 80 feet from appellant's residence; that during all of said day said Turner, as agent for appellee, kept a lookout for appellant in order to pay said note and interest, and was unable to find him; that said note was not presented at said bank either on the 25th of February or 26th day of February for payment; that during the 26th day of February, 1908, appellant remained at his house practically all day, and was not seen by said Turner; that about 5 o'clock, on the evening of said 26th, appellant went to the office of a lawyer in said town of Jamestown, and consulted him as to his rights in reference to said notes and mortgage; that on the 27th day of February, 1908, at about 11.30 o'clock A. M., plaintiff again went to the office of said lawyer, and in company with him went to said bank and presented said note falling due February 25, 1908, and demanded payment thereof; that the officers of said bank, who had been informed by the appellee and Henry Turner that said deposit of

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appellee was to be applied to the payment of appellant's said note and interest, then informed said appellant that the defendant had sufficient money on deposit to pay the note presented, but that they had no express authority or order directing them to make payment, but that defendant's agent, Henry Turner, was authoried to draw a check for the amount; that, immediately after receiving said information, the appellant and his attorney left said bank, and appellant thereupon directed his attorney to institute suit upon said notes and to foreclose said mortgage, and said attorney left Jamestown on the 27th of February, 1908, for the city of Lebanon to file suit on said notes; that upon appellant's return to his residence from the bank said Turner saw him, and told him that he desired to see him, but appellant excused himself, saying that he would see Mr. Turner after dinner; that about 12.45 P. M. on said 27th appellant went to appellee's place of business immediately across the street from his residence, and saw said Turner, who at the time informed appellant that he desired to pay the note due February 25th, with the interest thereon and one year's interest on each of the other notes, and asked appellant if he would accept the money; that appellant informed said Turner that he would not; that said Turner thereupon importuned said appellant to accept the money and permit him to draw a check in payment of said note and interest, but appellant refused and told said Turner that he would not accept money or check; that, under the provisions of the mortgage, the notes were all due, and that the attorney had left Jamestown on the 12.40 car for Lebanon to file a suit upon said notes and to foreclose said mortgage; that on the same day, and prior to the filing of the answer herein, the defendant paid to the clerk of the Boone Circuit Court, as a tender of the principal of said note and the interest thereon until that day and one year's interest on each of the other notes, the sum of $1,248 in standard gold coin of the United States, which sum is still in the hands of the clerk of this court as a tender to the plaintiff in payment of the principal of said note and the interest thereon until the day of filing said answer, and one year's interest on each of the other notes; that on the 25th, 26th, and 27th days of February, 1908, and upon each of the same and during the whole of each of said days, the appellee had upon general deposit in said bank, subject to check, a sum of money in excess of $1,250, and prior to either of said days the bank had been informed by appellee that so much of said deposit as might be necessary to pay first note and interest due on February 25, 1908, was to be applied to such payment; "that the plaintiff failed to present said note due by date on February 25, 1908, to said bank on said day for payment and remained away from Jamestown on said date to avoid the said Henry Turner, and prevent payment on said day, with the wrongful and deliberate purpose and intent of making a default in the payment of said note and interest, when due, in order to render all of said notes due, so as to authorize a suit thereon; that the defendant Rose Nugent is the wife of the defendant Thomas Nugent."

The court stated in its conclusions of law upon the facts found, as follows: "(1) That plaintiff is entitled to a judgment against the defendant Thomas Nugent for $1,248 and an order upon the clerk of this court to apply the money in his hands as a tender to the pay-

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ment of said judgment; (2) that each of the defendants are entitled to a judgment against the plaintiff for costs."

In the determination of the controlling question presented by this appeal, the appellant has in his favor the statute and certain general principles declared and recognized by the decisions of this and the Supreme Court.

(1) A note made payable at a particular time and place does not impose upon the payee or his assignee the necessity of averring or proving a demand at the time and place fixed in the note; but the payor may show a readiness to pay such demand at such time and place. Section 374, Burns, 1908; Glatt v. Fortman, 120 Ind. 384, 22 N. E. 300; Eaton, etc., R. Co. v. Hunt, 20 Ind. 457; Brown v. McElroy, 52 Ind. 404, 406; Dillingham v. Parks, 30 Ind. App. 61, 69, 70, 65 N. E. 300. It follows from the above that the maker of a promissory note, payable at a particular bank, cannot discharge such obligation by depositing in such bank the funds with which to pay said obligation, and that money so deposited in such bank cannot be deemed to be deposited with the payee's agent, except, of course, that, in the case the holder of such note deposits the same at such bank for collection, he thereby constitutes such bank his agent for such purpose. Glatt v. Fortman, supra, at pages 385, 386, 120 Ind., 22 N. E. 300; Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95; Dillingham v. Parks, supra.

(2)(3) Provision in a mortgage of the kind here in question are not in the nature of penalties or forefeitures, "but are to be regarded as agreements between the parties fixing the time and conditions upon which the whole debt may become due." Moore v. Sargent, 112 Ind. 484, 14 N. E. 466; Jones on Mortgages (6th Ed.), § 76.

(3)(4) In such provisions time is the essence of the contract, and a court of equity will not relieve the mortgagor from a default, unless he can show some good excuse for it. Moore v. Sargent, supra; Jones on Mortgages (6th Ed.), § 1179. On the other hand, there are holdings which throw light upon this question from appellee's viewpoint. Upon the subject of appellee's conduct with reference to the default and the effect of his depositing the money at the place of payment, the courts of our own and other States have expressed the opinions following: In the case of the Bedford Bank v. Acoam, 125 Ind. 584, at page 587, 25 N. E. 713, at page 714, 9 L. R. A. 560, 21 Am. St. Rep. 258, the court says: "While we are not inclined to the view that a promissory note negotiable and payable at a bank in this State is in all respects the equivalent of a check drawn by the maker against a fund on deposit in the bank, so as to require the banker to pay the note on presentation out of funds applicable to that purpose, we can conceive of no valid reason why a note or bill thus drawn should not be held to authorize the banker to pay, and thereby become subrogated to all the rights of the holder to the same extent as if it had purchased the paper after maturity." In the case of Wallace v. McConnell, supra, at page 150, 13 Pet., 10 L. Ed. 95, the court says: "And when a note or bill is made payable at a bank, as is generally the case, it is well known that, according to the usual course of business, the note or bill is lodged at the bank for collection; and, if the maker or acceptor calls to take it up when it falls due, it will be de-

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livered to him, and the business is closed. But, should he not find his note or bill at the bank, he can deposit his money to meet the note, when presented, and, should he be afterwards prosecuted, he would be exonerated from all costs and damages upon proving such tender and deposit." This court, in the case of Dillingham v. Parks, supra, at page 70 of 30 Ind. App., at page 303 of 65 N. E., says: "Where the maker has no defense to the note, and has money on general deposit at such bank, it may in this State in good faith apply such funds in payment of the note upon the presentation thereof by the holder at maturity, and may set off the amounts so paid against the demand of the maker for the money so on general deposit. . . . The failure to make presentment at the bank does not relieve the maker from his promise to pay, but only relieves him from damages in case he is ready at the bank to pay, and there is no one there to receive the money. Such facts are regarded as equivalent to a tender of the sum payable; and an answer showing such tender and payment of the money due into court will bar a recovery of interest and costs, but will not bar the causes of action on the note." To the same effect is the case of Bedford Bank v. Acoam, supra.

(4) Upon the subject of the default being caused by the acts or conduct of the payee of the obligation and the effect thereof, our own and other courts have expressed themselves as follows: In the case of Moore v. Sargent, supra, the court says: "Or if the default was induced by the fraudulent or inequitable conduct of the creditor, or by any agreement or promise upon which the debtor might rely which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings or the action might be abated upon the facts being properly pleaded." In the case of Eaton, etc., R. Co. v. Hunt, supra, the court says at page 468 of 20 Ind.: "But if the maker on the trial proves that the money was at the place, ready to be applied in payment when the note fell due, he will not be subject to costs. Indiana & Illinois R. R. Co. v. Davis, 20 Ind. 6 [83 Am. Dec. 303]." In the case of Glatt v. Fortman, supra, the court says: "The readiness to pay at the place designated constitutes a defense if properly followed up." In the case of Noyes v. Clark et al., 7 Paige (N. Y.) 179, at pages 180, 181, 182, 32 Am. Dec. 620, the court says: "A court of equity, however, will not permit the mortgagee or his assignee to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed, but who is unable to do so in consequence of the act of the other party. . . . In this case it is evident that the defendant Clark was both ready and willing to pay the interest on his bond and mortgage on the day it became due. And, if the assignee did not intentionally deprive him of the power of doing so by keeping out of the way and concealing his place of residence, he transacted the business of the assignment in such an unusual manner as to produce the same result. . . . The case of Johnson v. Houlditch (Burrow's Rep. 578) is in point to show the authority of the court to interfere and stay the proceedings in such a case. There the plaintiff had kept out of the way to prevent a tender of the debt, and the court, upon the ground that the suit was oppressive, ordered the suit to be stayed upon payment of the amount due, without costs, although a technical right of action existed when the suit was brought." In the case of Bell v.

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Romaine, 30 N. J. Eq. 24, at page 28, the court says: "If the complainant has given further day of payment or in any other way waived the payment, according to the letter of the bond, the default contemplated and provided against has not happened." De Groot v. McCotter, 19 N. J. Eq. 531. Pomeroy in his Equity Jurisprudence says upon this same subject: "It seems, also, that a court of equity may relieve against the effect of such provision where the default of the debtor is the result of accident or mistake, and, a fortiori, when it is procured by the fraud or other inequitable conduct of the creditor himself." We might quote from the decisions of courts of other jurisdictions language similar to that above expressed, but we think we have quoted sufficiently to show that the general tendency of the decisions of the courts upon this subject is to hold that a suitor may not come into a court of equity and successfully invoke the aid of such court to enforce and foreclose a lien and subject to sale the property of another on the account of a default for which such suitor is himself responsible, especially when the alleged defaulter himself stood ready and willing at the agreed time and place to prevent the default.

Appellant concedes that "if nothing were involved in this case but the right to recover upon the first note the judgment is right," but insists that "it having been agreed in the mortgage that the failure to pay any one of said notes at maturity should cause all of said notes to become due and collectible, the court is wholly without authority to say that the readiness of the appellee to pay any of said notes at maturity should prevent the remaining notes from falling due." It must be conceded that this position of appellant is strongly supported by the authorities, supra, if he be right in his assumption that the finding of facts shows no more than a mere readiness of appellee to pay the first note at maturity and the interest on the others at the time and place fixed in said note for its payment; but it is in this assumption that counsel is in error. The findings show more than a readiness on the part of appellee to pay. They show that he actually placed and kept on deposit in the bank where said note was made payable the money for the purpose of making such payment with instructions to the bank that the money on deposit was for such purpose, and that payment was prevented on the day it was due by and on account of the failure of the appellant to present said note with the intent and purpose of causing a default in such payment, in order to render all of said notes due so as to authorize suit thereon. Under such facts, to conclude other than as the lower court concluded in this case would be to run counter to the rules of equity, and permit the mortgagee to take an unconscionable advantage of the mortgagor who was ready and willing to pay at the time and place prescribed in his agreement, but was prevented from so doing by the acts of the mortgagee. But appellant insists that, where the mortgagor fails to pay at the time fixed, he can be relieved from such default in payment only by showing that such payment was prevented "by accident, mistake, or fraud of the creditor," and that neither of such facts is found by the special findings in this case. If, in the absence of a finding of accident or mistake as the cause of the default, it was necessary to find that the same was caused by the fraud of the payee, appellant's contention would be supported by

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authority, because there is in the finding in this case no finding of fraud, and we recognize the rule that requires fraud to be found as a fact and not left to inference where it is relied upon as a cause of action or defense. But we do not regard the holdings, supra, as requiring that fraud shall be proved in case of accident or mistake is proved. The recisions, supra, include all inequitable conduct on the part of the payee that causes the default. The payee is just as much bound by the terms of the provisions upon which the default rests as is the payor. Such provision is not intended as a means whereby he may at his own option take advantage of the payor and by his own conduct force a default; but, if he by his own act causes the default whether the act on his part be by deceit and fraud, or by some other means, he may in no event take advantage of the default which he himself so caused. For these reasons, we are of the opinion that there is no error in the conclusions of law on the facts found. Appellant insists that neither the decision of the court nor either of the facts found are sustained by sufficient evidence; but an examination of the evidence in the record convinces us that there was evidence tending to support each finding of facts and that neither of the several grounds of the motion for new trial presenting this question in different form presents any reversible eror.

The only other ground for the motion for new trial presented by the points and authorities of appellant relates to the exclusion of certain offered evidence of appellant on cross-examination. We are of the opinion that no error was committed in the exclusion of this evidence; but in any event our view of the case, as above expressed, upon the question of there being no necessity for a finding of fraud in this case, eliminates any prejudicial or controlling influence resulting from the exclusion of the evidence offered. We find no error in the record.

Judgment affirmed.

Decision No. 1400.

LAMBERSON ET AL. v. LOVE.

(Supreme Court of Michigan. May 8, 1911.)

BILLS AND NOTES — ACCOMMODATION PAPER — EVIDENCE.

Sureties on defendant's son's contract, becoming liable, induced defendant to give a note payable to the obligee's agent; the sureties also signing it. The sureties borrowed money, paying it to the agent, who indorsed the note to them without recourse. Held, that defendant was an accommodation maker for the sureties' benefit.

The relations and liabilities of parties to accommodation paper can be shown by parol evidence.

Accommodation paper is discharged by payment thereof by the accommodated party, both under the express provision of Negotiable Instruments Law, § 121, and independent thereof.

Error to Circuit Court, Kalamazoo county; Frank E. Knappen, Judge.

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Action by Charles A. Lamberson and others against Charles M. Love. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before BIRD, HOOKER, MOORE, McALVAY, and STONE, JJ.

Frost & Farrell, for appellants. Jackson & Fitzgerald, for appellee.

McALVAY, J. Plaintiffs were guarantors or sureties for one George Love to secure the faithful performance of a certain contract between him and a medical company, which had agreed to furnish him as its salesman certain medicines, extracts, etc., upon certain terms and conditions, and for which he agreed to pay in time and manner provided in the written contract. George Love defaulted in the performance of this contract to the amount of $681.40. Later suit was brought against him and his sureties upon this contract to recover this amount. George Love left for parts unknown. He is the son of the defendant. Plaintiffs undertook no defense to the suit against them. After it was begun they interviewed defendant for the purpose of being relieved from it and to avoid the payment of the amount claimed, and told him they came to find George, and that he was short about $700, and they had been called upon to settle. One of them mentioned the fact that George had made himself liable to arrest. Later, on September 30, 1908, the company's agent, Hunter, came to Kalamazoo. One of the plaintiffs called defendant by telephone, telling him that fact, and that he (plaintiff) wanted to get the matter settled and wanted defendant to pay it. The same day plaintiffs and the agent drove to defendant's farm for the purpose of getting this obligation upon which suit had been brought out of the way. After some talk it was agreed that, if defendant would give a note for $600, plaintiffs would sign it as sureties, and a note for that amount was drawn up by the agent payable to him, and was signed by the parties as agreed. Plaintiffs signed on the back "as sureties." The next morning plaintiffs met Hunter at the bank. They borrowed $600 on their four months' note, giving the money to Hunter; he having turned over to them the note executed the day before. This note they put into the bank as collateral to their note. Hunter also surrendered to them the contract with George Love upon which suit had been brought, and that suit was discontinued. Plaintiffs' note at the bank was renewed from time to time until the note signed by defendant came due, which he upon demand refused to pay, and they were then called upon to pay their indebtedness. After such payment they brought this suit. This note reads as follows:

"$600.00. Texas, Kalamazoo County, Mich., Sept. 30, 1908.

"On or before one year after date, I promise to pay to R. A. Hunter or order six hundred dollars with interest at the rate of six per cent. annually from date. Value received. Payable at Kalamazoo, Mich. C. M. Love."

With following indorsements on back:

"As sureties, C. A. Lamberson, J. C. Bogard." "Without recourse on me. R. A. Hunter."

At the close of plaintiff's case, defendant moved for an instructed verdict, for the following reasons: (1) Want of consideration for the

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note. (2) That it was in fact plaintiffs' obligation for their benefit. (3) Defendant was an accommodation maker for plaintiffs' benefit, and, having paid their own obligation, they could not recover from him. This motion was granted, a verdict for defendant was accordingly returned, and upon it a judgment was entered.

But one question is raised in this court by appellants. They contend that the court erred in directing a verdict.

It is clear that at the time these parties met, and the note in suit was made, defendant was in no way related to or obligated upon the contract with his son George upon which suit had already been brought. It is undisputed that defendant received no consideration when he signed the note. The testimony shows why plaintiffs were there. Lamberson testified: "It was for the purpose of getting this obligation that we had been sued upon settled, that we went out to Mr. Love's farm." Plaintiff Bogard testified: "We went out there for the purpose of getting this settled, and signed this note for the purpose of settling, so as to be relieved from this suit which had been started by the Rawleigh Medical Company. Mr. Love had agreed to settle this before. That was why I went out there; that is after the suit had been started against us. My only interest in this matter was to be relieved from the suit started against us so that we would not have to pay the $680. Mr. Love wanted us to sign the note, but we didn't care about what Mr. Love wanted unless we were relieved from this obligation. Our sole purpose in signing this note was to get relieved from this suit." The record shows that the note was not signed by defendant at the request of the agent, Hunter, nor upon his agreement to discontinue the suit against plaintiffs. Nor was the money obtained by Hunter at the bank upon the note in suit.

(1) Plaintiffs at the bank borrowed $600 on their note, paid it to Hunter, who indorsed the note to them without recourse, and surrendered to them their obligation to his company. These facts have been repeated to make clear the relations between the parties to this suit upon the note plaintiffs have paid. It is clear to us that this transaction was for their benefit. The consideration was moving to them. Their liability was reduced $81, and the suit was discontinued. In paying their note at the bank, they paid their own obligation. It follows that defendant upon this note was an accommodation maker for their benefit. This is shown by the evidence.

(2) The weight of authority is that the relations and liabilities of the parties to accommodation paper may be shown by parol evidence, and it may be shown that a person who is apparently liable only secondarily on the instrument is in fact the principal debtor. 1 Am. & Eng. Enc. of Law (2d Ed.) 343.

(3) It is settled law that the payment of accommodation paper by the party accommodated discharges the instrument. This is also now the express provision of our negotiable instruments law. Act No. 265, P. A. 1905, § 121.

It follows that plaintiffs acquired no right of action against defendant, for as between them there was no consideration.

The trial court was not in error in directing a verdict for defendant.

The judgment is affirmed.

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Decision No. 1401.

ZALOOM v. GANIM ET AL.

(Supreme Court, Appellate Term. April 27, 1911.)

129 N. Y. Sup. 85.

BILLS AND NOTES — CHECKS — PRESENTATION.

Where no question of fact is in dispute, the determination of what is reasonable diligence in presenting a check for payment, in order to charge the drawer, is one of law for the court.

Negotiable Instruments Law, § 322, provides that a check must be presented for payment within a reasonable time after its issue. Section 4 provides that, in determining what is a reasonable time, regard is to be had to the nature of the instrument, any usage of trade or business with respect to such instruments, and the facts of the particular case. Held that, in view of the custom of the New York Clearing House Association, the deposit of a check received after banking hours, on the morning of the day after its receipt, and its presentment for payment in the usual course of business by the bank of deposit on the day following, showed due diligence in presentment; "reasonable" being a relative term, to be determined according to the circumstances of the case, "reasonable time" meaning "so much time as is necessary under the circumstances conveniently to do what the contract requires," and "usage of trade" meaning a known, uniform, and reasonable usage, not contrary to law or public policy.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Selim F. Zaloom against Beshara Ganim and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before HENDRICK, LEHMAN, and DELANY, JJ.

Benjamin Patterson, for appellants. Samuel J. Siegel, for respondent.

HENDRICK, J. A check is defined by section 321 of the negotiable instruments law (Consol. Laws 1909, c. 38) as "a bill of exchange drawn on a bank, payable on demand." The same section provides:

"Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

Section 322 limits the time within which a check must be presented in the following language:

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

As to a reasonable time the law (section 4) reads:

"In determining what is a reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

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The facts found by the trial justice must be regarded as the facts of this particular case, and are in part as follows: The defendant gave his check, dated August 4, 1910, drawn on the European-American Bank in this city, and delivered it between 4 and 5 o'clock in the afternoon of the day of its date to the plaintiff in payment of a debt. Plaintiff on the following day, August 5, 1910, deposited the check to his account in his own bank of deposit, the National Reserve Bank, which is also located in this city. On August 6, 1910, the National Reserve Bank, in the regular course of business, presented the check to the European-American Bank for payment, where payment was refused, because of the fact that the State Banking Department had taken possession of the bank, which had suspended payment. Had the check been presented on August 5, 1910, it would have been paid.

(1) There being no question of fact in dispute, the determination of what is reasonable diligence in presenting the check for payment, in order to charge the drawer, is one of law for the court. National Bank v. Zimmerman, 185 N. Y. at page 217, 77 N. E. 1020.

(2) The Negotiable Instruments Law does not define the period which may elapse between the giving and presentment of a check, but makes it incumbent on the payee to present it within a reasonable time. Section 322. "Reasonable" is a relative term, to be determined according to the circumstances of the case. 33 Cyc. 1560. "Reasonable time" means:

"So much time as is necessary under the circumstances conveniently to do what the contract requires should be done." Hinds v. Kellogg, (Com. Pl.) 13 N. Y. Supp. 922.

Lord Ellenborough, in a leading case (Rickford v. Ridge, 2 Campb. 537), discussing the rules of law applicable to checks, their presentment, notice, and protest as between drawer and payee, says:

"The rule to be adopted must be a rule of convenience."

Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. 2 Bouvier's Law Dictionary, 1182. By the phrase "usage of trade" the law means usage fixed in the commercial law. It must be known, uniform, certain, reasonable, and not contrary to law or opposed to public policy.

"The true test of a commercial usage is its having existed a sufficient length of time to become generally known, and to warrant a presumption that contracts are made in reference to it." Smith v. Wright, 1 Caines 43, 2 Am. Dec. 162.

Before the establishment of the Clearing House Association on October 11, 1853, there were fifty-two banks in this city, each sending messengers back and forth to present checks for payment, and, as there was no national currency, balances had to be paid in gold coin. The labor of counting and carrying this was so onerous that actual transfers of cash were made but once a week, although accounts were balanced on the pass books and bills were exchanged daily. The bags of coin were so heavy and precious that they were often transported in wagons guarded by militia. Since the formation of the Clearing House Association the obligations of almost the total number of banks in this city are balanced daily, with the least possible transfer of actual cash from debtor to creditor banks. The messengers of the various banks meet daily at a stated time at the Clearing

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House, to adjust balances of accounts and receive and pay differences, thus obviating the confusion, labor, expense, and danger of loss which would be incident to the presentment of hundreds of thousands of checks daily to the various banks in this city. Encyclopedia Americana.

The annual report for the year 1910 of the manager of the New York Clearing House Association shows that in 1854 the average daily clearings through the New York Clearing House were $19,104,504.94, and the clearings for that year were $5,750,455,987.06. In 1906 the average clearings were $342,422,772.57, and the total for that year was $103,754,100,091.25. In 1910 the daily average clearings were $338,461,911.11, and the total for that year was $102,553,959,069.28. The average number of checks that pass daily through the New York Clearing House is 250,000. The Clearing House Association is now composed of thirty-one national banks and eighteen State banks. There are thirty-one banks and trusts companies in the city of New York and vicinity, not members of the association, which make their exchanges through banks which are members of the association — a total of almost every bank and trust company in this city.

(3) This usage of trade and business in presenting checks for payment has become incorporated into the banking business of the State and country, and would be seriously affected if immediate presentment to the paying bank were required. Bearing in mind the general commercial law that the paying bank is required to satisfactorily identify the payee (Meyers v. Brown [App. Div. Feb., 1911] 127 N. Y. Supp. 374, reported in the New York Law Journal February 8, 1911) and bearing in mind, also, the vast number of checks daily used in the city of New York, it is apparent that, if the banks and trust companies of New York city were required, immediately upon their receipt, to present deposited checks to the banks upon which they are drawn for payment, confusion amounting almost to chaos would be the result.

In Hooker v. Franklin, 2 Bosw. 500 (affirmed, Court of Appeals, October, 1861), Bosworth, J., says:

"A rule which required all banks in the city of New York to present for payment all the checks deposited by their customers on the day of their deposit would compel them to decline business of that character, and defeat the objects, in many cases, for which deposits are made, and put an end to certain facilities, which result from obtaining credit for the amount of a check, for the day of its deposit, without providing for its payment until the following morning."

It is further said:

"Certainly no laches can be imputed to a depositary, receiving it for presentment and collection, who, in presenting it on the next day after its receipt, acts in conformity with the regular and established course of business in such cases."

I have not overlooked the cases which hold that a check on a bank in the city in which the payee resides must be presented for payment not later than the day following its receipt. These cases may be distinguished from the case under review. The facts and circumstances in each case must in a great degree govern the rule to be applied, and the facts in those cases differ materially from those of the present case. They are briefly as follows:

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In Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690, the payee of a draft, upon presenting it for payment, by surrendering it to the drawee and accepting a check for the amount, which he neglected to present until the following day, discharged the drawer of the draft.

In Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43, a debtor paid his debt with a check of a third party, indorsed by himself. By the neglect of the creditor to present the check for payment until nine days thereafter, the debtor was discharged from liability as indorser, irrespective of any question of loss or injury.

In Kramer v. Grant, 60 Misc. Rep. 110, 111 N. Y. Supp. 709, the attorney for the payee of a check (and for the purpose of that, his agent) appropriated and negotiated the check, instead of depositing it for collection within twenty-four hours after it was received, and the court does not even intimate that presentment for payment must be made within 24 hours.

In Murphy v. Levy, 23 Misc. Rep. 147, 50 N. Y. Supp. 682, the payee delivered the check to a third party in payment of his debt, and it was not presented by the third party for payment until four days thereafter.

In Dehoust v. Lewis, 128 App. Div. 131, 112 N. Y. Supp. 559, the check was received in payment of the debt on October 12th, and was not desposited by an indorsee until October 23d; all of the parties residing in the same city.

Upon the facts in this case, the deposit of the check on the morning of the day after its receipt, it having been received after banking hours, and its presentment for payment in the usual course of business by the bank of deposit on the day following, shows due diligence in the presentment of the check. I am confirmed in the views herein expressed by the opinion in Loux & Son v. Fox, 171 Pa. 68, at pages 72, 73, 33 Atl. 190, a case almost identical with the one under consideration.

The judgment should be affirmed, with costs.

LEHMAN, J., concurs.

DELANY, J. (dissenting). This action was brought to recover the amount of a check made by the defendants to the order of plaintiff on the European-American Bank in this city, which suspended before the hour for opening of business on August 6, 1910. The check was dated August 4, 1910, and was delivered to plaintiff on that day; the defendants claiming at 9 o'clock in the morning, but the plaintiff between 4 and 5 o'clock in the evening. The judgment was for plaintiff, and, if the time in dispute is to be considered as a determining factor in the case, we must assume here that the court below found as a fact that the check was received by the plaintiff at the later hour. The plaintiff on the following day, August 5th, deposited the check to his account in the National Reserve Bank in this city. That bank did not present it to the European-American Bank until the day after, August 6th, when the latter had closed.

I am constrained to dissent from the judgment of the court, because it seems to me repugnant to the law as laid down in an unvarying line of decisions in practically every judicature recognizing the common law, and because the statutes in this State have not occasioned

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any change so far as the phase here presented is concerned. Most of the decisions alluded to were pronounced before the enactment of the negotiable instruments act; but the rule which may be drawn from them requires no modification in statement on that account, since the act, so far as applicable to the case under consideration, is merely declaratory of the common law.

(2) The rule thus established regarding the time within which a check drawn on a bank in the same city as that of the payee must be presented may be a rigorous one; but, whether so or not, it has a time-honored acceptance, and may be assumed as a condition recognized as controlling in business relations. The payee must present the check to the bank for payment, it is true, within a reasonable time; but the stringent requirement emphasized in every case is promptness in presentation, and what time, as a matter of law, must elapse before such presentation, in order to justify a finding of want of promptness, must depend upon how we can harmonize the various expressions of the courts on the question. Some courts have held that a check is to be considered like an inland bill of exchange, and should be governed by the same rules. Smith v. Janes, 20 Wend. 192, 32 Am. Dec. 527. Others that a check is to be presented within twenty-four hours after its receipt. Kramer v. Grant, 60 Misc. Rep. 111, 111 N. Y. Supp. 709. Others, again, that it is to be presented on the same day or the following day. Smith v. Janes, supra; Dehoust v. Lewis, 128 App. Div. 132, 112 N. Y. Supp. 559; Carroll v. Sweet, 128 N. Y. 22, 27 N. E. 763, 13 L. R. A. 43. Others still, within business hours of the following day. Murphy v. Levy, 23 Misc. Rep. 149, 50 N. Y. Supp. 682. Nor is one required to make this presentation for payment excused for failure to do so by the fact that he has transferred it to another for collection. Kramer v. Grant, supra; Smith v. Miller, 43 N. Y. 171, 177.

The plaintiff in the case at bar, therefore, cannot claim as an excuse that for his own convenience he deposited the check in another bank for collection. This act would, in the usual course of business, necessarily postpone its collection for one additional day. If prompt collection required its presentation the day following its receipt, he adopted this course at his peril. If a rule is to be deduced from all the cases cited, I think that it may be stated thus:

"The promptness enjoined requires that, in the absence of any extraordinary circumstance, the holder of a check on a bank in the same city should present it for payment not later than the closing hours of the bank's business day following its receipt."

This case is extremely close, but I nevertheless believe that it comes within the rule that, where one is willing to accept payment in that form, he must, to save himself harmless, act with the required promptness. A consideration which might be a makeweight in determining whether this strict rule should be applied here is this: The plaintiff intrusted the collection of the check to slower agencies than direct presentation, and he thus relied upon the stability of one bank, or the quickness of action of the other. This reliance should work to his own detriment, rather than to that of the maker of the check, and it may well be that some such reason lies at the base of the decisions.

The case at bar presents no feature which would require considera-

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tion on the question of "reasonable time," unless it is found in the negotiable instruments act, or affected by marked changes in the necessities or usages of the present-day business world. The negotiable instruments act of this State, regarding what must be considered in determining what is or is not a reasonable time, has not changed the substance of the pre-existing law on this subject. Dehoust v. Lewis, supra; Kramer v. Grant, supra. Its terminology is that of the English bills of exchange act, 1882 (45 & 46 Vict., c. 61), which is in fact the basis of all similar statutes in the United States. Its verbiage is taken from the courts of common law. Huffcut on Negotiable Instruments gives an exhaustive treatise on the origin of these statutes, and the English decisions, since the enactment of the bills of exchange act, have not varied the law on this subject.

It is a general rule that, when a foreign statute is re-enacted, it is to be understood as it has been interpreted by the courts of the country from which it is taken. Waterford v. People, 9 Barb. 161; Ryalls v. Mechanics' Mills, 150 Mass. 191, 22 N. E. 766, 5 L. R. A. 667; Commonwealth v. Hartnett, 3 Gray (Mass.) 450. And it is fair to infer that the Legislature intended that the words used should have the meaning given them by the courts. Bellegarde v. Union Bag & Paper Co., 90 App. Div. 577, 86 N. Y. Supp. 72. Applying this test, the common law may be said not to have undergone any change, so far as this question is concerned, and all our decisions on this matter are as applicable after as before the statutes were enacted.

The Massachusetts statute is identical in language with our negotiable instruments act, and the Supreme Court of that State in a case decided in 1907 holds:

"The negotiable instruments act provides generally, . . . as the judge said, that 'in determining what is a "reasonable time," or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case.' This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered when passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is that, where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer." Gordon v. Lovine, 194 Mass. 421, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565, citing numerous cases in other States to the same effect.

The establishment of a clearing house has undoubtedly simplified banking operations; but, whether it has or not, the law is unaffected by it, for a number of the decisions referred to have been rendered since that event, and some of them arose out of transactions between parties in the city of New York. Dehoust v. Lewis, supra; Kramer

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v. Grant, supra; Carroll v. Sweet, supra; Williams v. Brown, 53 App. Div. 486, 65 N. Y. Supp. 1049; Grant v. MacNutt, 12 Misc. Rep. 21, 33 N. Y. Supp. 62; Murphy v. Levy, 23 Misc. Rep. 147, 50 N. Y. Supp. 682; Smith v. Miller, supra.

The case of Loux & Son v. Fox, 171 Pa. 68, 33 Atl. 190, cited in the opinion of this court, is contrary to the entire trend of the decisions in that State, which are in tenor the same as those in this State (National Bank v. Weil, 141 Pa. 460, 21 Atl. 661); and it is inconclusive, in that the court does not disavow the rule, but affects to be in accord with it, resorting to the pretext of striking out the day of receipt as not to be counted. The court says:

"Considering the hour of the day when the check was delivered to the defendants, it is practically the same as if in express terms it had been made payable on the following day. There is, therefore, no good reason why it should not be treated as received on the 7th, instead of the 6th, of May, 1891."

I do not see that, either by reason of the statute, or any local usages which have existed for years, or any peculiar necessities of the situation, there is sufficient to justify what seems to me to be a departure from the rule which has obtained here and elsewhere since checks were in vogue. Moule v. Brown, 33 Eng. C. L. Rep. 705; Alexander v. Burchfield, 49 Eng. C. L. Rep. 1060.

The judgment should be reversed, with costs, and the complaint dismissed, with costs.

Decision No. 1402.

CRESCENT COAL CO. v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. March 18, 1911.)

135 S. W. 768.

CARRIERS.

A railway company need not carry freight between points within ordinary switching limits at a given station; but, where it operates a belt line and carries freight between industrial plants thereon for compensation, refusal to carry coal from a mine on such line to one of such plants is unlawful discrimination, though the spur tracks involved are within what the company calls its switching limits, and regardless of the length, location, and proximity of the spur tracks and the character of the plants.

A railway company owes the same duty to furnish transportation facilities to an industrial plant connected with its line by spur tracks that it does to plants situated on the main line.

A railroad company may establish reasonable depots or places at which it will receive and deliver freight and cannot be required to receive or handle it at other places; but it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat all patrons without discrimination.

A railway company cannot justify discrimination in refusing to carry coal between a mine and an industrial plant on a belt line in a city while carrying other

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freight between points on that line on the ground that it obtains an additional haul from the other freight before or after the haul on the belt line.

A general carrier of freight cannot discriminate between shippers or classes of freight.

A railway company operating a belt line cannot refuse to transport coal between a mine and industrial plants on such line because it has never hauled coal before.

No length of time or habit of dealing will discharge a carrier's duty to serve the public without discrimination.

A railway company can fix reasonable rates for carrying freight between points on a belt line operated by it, classified according to the different kinds of freight.

A carrier which has published one rate for carrying freight between points on its belt line cannot exact a higher rate for carrying coal from a mine to a consuming plant, though the published rate was fixed in view of an additional in or out haul obtained from ordinary freight.

A dealer cannot recover damages for a carrier's refusal to transport coal arising from his contract to buy the coal to be carried, where the amount of coal to be delivered was optional with the seller, and it does not appear that the dealer made any contracts for resale on the faith of it that caused him loss; but as to another agreement binding the seller to deliver a specified amount the dealer can recover the enhanced cost of delivering coal under contracts for resale made on the strength of such agreement.

Appeal from Circuit Court, Henderson county.

Action by the Crescent Coal Company against the Louisville & Nashville Railroad Company. Decree dismissing the petition, and plaintiff appeals. Reversed for new trial.

Clay & Clay, for appellant. Charles H. Moorman, Yeaman & Yeaman, and Benjamin D. Warfield, for appellee.

CARROLL, J. The appellant, Crescent Coal Company, is the business name assumed by Joe Higdon, who in 1908 was engaged in buying and selling coal in the city of Henderson. The appellee, Louisville & Nashville Railroad Company, was at the time, and is, a corporation organied under the laws of Kentucky and engaged in the business of a common carrier of passengers and freight. Its main line of road runs into and through the city, and in addition to its main line it operates and controls what is called a "belt line," running from its main line in two directions through the city. Leading from its main and belt line, there were a number of spur tracks that ran into various industrial plants in the city of Henderson, situated near its main and belt lines of road. These spur tracks were used for the purpose of transporting freight to and from these industrial plants, and were operated by the company as a part of its line of road. The Keystone Mining & Manufacturing Company was engaged in the operation of a coal mine in the city of Henderson, and was connected with the main or belt line by a spur controlled and operated by the appellee company.

In April, 1908, Higdon, in the name of the Crescent Coal Company, conceived the plan of supplying the industrial plants in the city of Henderson that had spur connections with the main or belt line of the appellee company with coal mined from the Keystone mine. His

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purpose was to have cars furnished by the appellee company loaded with coal at the mine, and then transferred by the appellee company to the industrial plants in Henderson that had spur connections. With this object in view, he entered into a contract with the Keystone company, by the terms of which he was to be furnished by it during the year beginning July 1, 1908, 20,000 tons of coal, which it was stipulated in the contract should be delivered to him on the spur track at its mine. Another contract made in May, 1908, gave him the right with certain conditions to sell the output of the mine in excess of 20,000 tons. After making these contracts with the Keystone company, he contracted with various industrial plants having spur connections with the line of the appellee company to deliver to them at their plants in car load lots, at a stipulated price, a large quantity of coal. On July 1, 1908, he applied to the appellee company to furnish him cars at the Keystone company's mine to be loaded with coal and hauled by it to the industrial plants, and proposed to pay for the services $4 per car, which would be about 10 cents per ton. The appellee company refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish cars but would charge for the service 50 cents per ton. This offer, which was kept open until August 13, 1908, Higdon refused to accept, and on August 13th the appellee company informed him that it would not furnish cars for this service at any price. Thereupon Higdon brought this suit against the appellee company, setting up his contracts, and the action of the appellee in preventing him from fulfilling them, and sought to recover damages to compensate him for the loss he had sustained. The action was brought on the ordinary, or common-law, side of the docket, but on motion of the appellee company was transferred over the objection of the appellant to equity, and, upon hearing, the petition was dismissed.

A number of legal questions are presented by the record, and we will endeavor to dispose of such of them as seem essential to a solution of the matters in controversy. The first, and perhaps the most important, question is: Was the appellee company under a duty as a common carrier of passengers and freight to render this service?

The evidence for appellee conduces to show that the coal mine and the industrial plants located in Henderson to which Higdon desired to deliver coal were all located within what are called the "switching limits" of the appellee company. It is therefore said that it should not be treated as a common carrier or charged with the duty of transporting freight as a common carrier from one point within these limits to another point within them. A common carrier, such as the appellee company was, may undoubtedly have what may be called yard facilities, including switches, spurs, and side tracks for its convenience in the handling, storing, and distribution of its cars and freight, and it would not be obliged as a common carrier to transport from one point to another in these yards, or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard. In the use of tracks laid in its yards for its own convenience in handling, storing, and distributing cars and freight, a common carrier cannot fairly be said to be engaged in the

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business of a common carrier in the sense that it must receive and deliver as at other points on its line of road freight or passengers. A rule like this would impose an unreasonable duty upon a common carrier and unnecessarily hinder and interfere with the conduct of its business. It is essential in the operation of railroads that they should have at terminals, and other places where the business requires it, yards and facilities that they may use in the conduct of their business, in such a way as not to be inconvenienced by the necessity of receiving and unloading goods for shippers. But we are not inclined to treat what the appellee company terms its "switching limits" in the city of Henderson as coming within the meaning of yards and terminals, such as we have described. The spur tracks to the coal mine and the industrial plants were not constructed, nor were they operated, for the convenience of the appellee company in handling, storing, and distributing its cars, engines, and other property. As we will presently show, they were constructed and were being used as a part of its railroad system, in carrying freight for compensation to and from the plants connected with its main line of road by these spur tracks. It is true these spur tracks were within what it called its "switching limits" and extended to factories and mills situated close to its line of road; but we regard as wholly immaterial, in the consideration of the question before us, the length of the spur track, or the kind of business establishments it connects the line of road with. Nor do we consider it a matter of any consequence how close together spur tracks, such as these, are located, or whether they are upon one part of its line or another. Whether they run to factories or mines in cities or towns, or to industrial plants in country districts, whether they are long or short, or close together or widely separated, they are to be considered a part and parcel of the system constructed and operated in its business as a common carrier, and the public have an interest in their conduct and operation that the carrier must respect. A railroad company owes to establishments connected with its line of road by these spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for transportation to one as it is to the other. It must serve all alike. Nor can a railroad company arbitrarily and without any relation to the use to which it is put designate a part of its track or system as "yards or switching limits" and then say that it owes no duty as a common carrier in this district except such as it may choose to assume, or say that it will or not, as suits its pleasure or convenience, perform service as a common carrier in this territory. A railroad company engaged in the general business of a common carrier cannot without regard to the convenience of the public classify or divide its trackage into divisions or parts and say that on one part it is a carrier and on another it is not. In the discharge of its duties to the public as a common carrier, a railroad company may establish reasonable depots or places at which it will receive and deliver freight, and cannot be required to receive or handle it at other places; but it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat without favor or discrimination all persons offering to it freight for carriage. The spur tracks to these various plants in

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Henderson were no more a part of its "yards or switching limits" than would be a spur track that connected its main line in a country district with a mill or factory.

It is shown by the evidence that the appellee company in 1908, and for a number of years prior thereto, had been in the habit of transporting car loads of freight from industrial plants in Henderson with spur connections to other industrial plants in Henderson with spur connections, but that it had never performed this service for the Keystone company. For example, it would haul a car load of corn from an elevator, connected with its belt or main line by a spur track, to a mill connected with its main or belt line by a spur track; but it would not haul a car load of coal from the mine to either the elevator or the mill. In explanation of this practice, and for the purpose of showing that it involved a different character of service from that sought by Higdon, it attempted to show, and did so do by its traffic agents, that the service it performed in hauling products from one industrial plant to another, such as from the corn elevator to the mill, was merely auxiliary or incidental to a transportation service that preceded or followed this local movement. Or, in other words, when it hauled for a nominal charge a car load of corn from the elevator to the mill to be converted into foodstuff of some kind, this foodstuff would necessarily be sold to parties outside of Henderson, and therefore it would get what it calls a transportation charge for hauling the food product from the mill at Henderson to the place it was shipped. And so it would be compensated in the transportation haul for the service it rendered in switching the cars from the elevator to the mill at a nominal price. It is said, however, that, if coal was hauled from the Keystone mine to a factory to be there consumed, the carrier could not get another haul out of this coal or the substance to which it was rdeuced, and therefore it had the right to decline to render in the transportation of coal the character of service that it rendered in the transportation of corn. Looking at this quqestion from the standpoint of the traffic manager of the appellee company, it doubtless presented to his mind sufficient reasons why the discrimination should be made. But, when considered in relation to the duties a common carrier owes to the public, it was wholly unjustifiable. A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and, if it was only engaged in the carriage of specified articles it would not be under any obligation to carry other things. If it carried for every person, who offered it, the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. Hutchinson on Carriers, vol. I, §§ 59, 90, 144. But, as the appellee company was engaged in the business of carrying coal, as well as all other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obliged to carry for all persons all classes and character of freight offered to it. Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. Law Rep. 1122. The argument is further made that it had persistently and uniformly declined to haul coal from this mine to places in Henderson, and this was well known to Higdon when he made the contracts referred to; but this custom did

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not confer upon it the right to continue the discrimination. That it had never engaged in the business of carrying coal in the manner desired by Higdon did not under the circumstances of this case authorize it to refuse to render the service when demanded. No length of time, or manner of treatment, or habit of dealing, will discharge a common carrier from the obligation to furnish to the public the service it is engaged in performing. The appellee company could not transfer between mills and factories corn, wheat, and other articles, and refuse to transfer under the same conditions coal.

It follows from these conclusions that the appellee company was not justified in refusing to render the service requested by Higdon.

The next question is: What rate did it have authority to charge for this service? In April, 1908, the appellee company published and issued a book containing its tariff rates. In this book we find the following: "The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson, Kentucky, terminals, but where any such service is performed as an accommodation, a charge of two dollars per car plus two dollars for car rental shall be assessed." This tariff rate was in force from May 4, 1908, until after July, 1909. It was this rate that Higdon demanded that the appellee company should charge for the service he requested. The railroad company, however, insists that this tariff rate was not intended to and did not embrace the character of service Higdon desired. Its general traffic manager testifies that this provision in its tariff sheet was made for the sole purpose of fixing a rate at which it would transfer cars between warehouses or industries that it had hauled from other points to Henderson, or that were loaded at Henderson for shipment to other places. For example, if a car load of freight was shipped from Memphis, Tenn., to the Henderson mills at Henderson, it would charge the regular transportation price from Memphis to its depot in Henderson, and in addition $4 for delivering the car from the depot to the Henderson mills on the spur track that ran into its establishment. Or, if a car load of food product was delivered to it by the Henderson mills on the spur in a car furnished for that purpose, it would charge $4 for carrying this car from the mills to its station in Henderson, and in addition charge the regular traffic rate for hauling it from there to the point of destination. In other words, the rate did not cover or contemplate a service in which a long haul did not follow or precede the movement of transferring the car to or from an industry in Henderson to its depot. Based on this theory, it is argued that the appellee company had not established or put in force any rate for the service demanded by Higdon at the time he requested it, and so it had the right to afterwards fix the rate at 50 cents per ton, which it did on July 13th. It is further said that this rate was reasonable, and, as Higdon declined to accept the service at this price, the company was thereby relieved from liability to him, unless he first brought the matter to the attention of the Railroad Commission and obtained from that body a ruling that the rate was not reasonable. If it were true that the appellee company had no fixed or esablished rate that covered this service at the time it was requested, we have no doubt of its right to fix a reasonable rate. We are further of the opinion that

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if the rate so asked was reasonable, and Higdon declined to accept it, he would not have any cause of action against the company growing out of the state of facts set up in his petition. Whether it is a condition precedent to the bringing of an action for damages, on the ground that a rate fixed for a particular service is unreasonable, that the shipper must first obtain a ruling from the Railroad Commission, it does not seem necessary to decide in the view we have of the case. It will be observed that the tariff rate previously quoted recites that the railroad company does not engage in the business of local switching between switches, tracks, warehouses, and industries in Henderson. But we have already determined that this declaration of what service it would perform did not authorize it to refuse to carry coal from the mine to the warehouses and industries in Henderson having spur connections. Therefore, so much of the provision as asserts that it will not perform this service need not be further noticed.

If the rate fixed was only for service rendered incidental to and in connection with a transportation service from which the company derived a benefit, and it was only a reasonable rate when considered in connection with the additional rate charged for transportation service, there would be much force in the argument that it was not a reasonable rate for the carriage of coal from the Keystone mine to industries in Henderson, as the company would get no other compensation from this service. But, conceding this, we are unable to relieve the company from the condition in which it voluntarily placed itself under the mistaken assumption that it was not required to render at all such service as Higdon requested. Undoubtedly the appellee company had the right to classify freight and make a reasonable difference in its charges for different kinds of freight transferred to or from one industry to another in Henderson. Its authority to make this classification and to fix different rates was as extensive as its authority to classify and charge different rates for different kinds of freight transported from one point to another outside of Henderson. But, in publishing its tariff rates for the information and use of the public, it did not stipulate for different rates or make any classification. It said in substance that, when it transferred cars from one industry to another in Henderson, it would charge for the service $4. Having thus established and promulgated the rate it would charge without any attempt to designate the character of freight it would transport for this charge, we do not feel authorized to interpret this rate as meaning that it would be charged for corn or flour or meal and not coal, or to limit its application to any particular article. The appellee company is bound not only by its published rate, but by its course of conduct under this published rate. It is shown by the evidence that for many years and whenever requested it transferred from one mill or industry to another mill or industry in Henderson, connected by spur tracks with its main or belt line, car loads of freight of different kinds and charged for this service the established rate. So if there was doubt about the meaning of this published rate, or the character of service it applied to, we find that the appellee company in its course of business construed it to mean that it was under a duty to, or at least would for the charge named, transfer loaded cars of freight from one factory or mill to another.

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Under these facts it was plainly a discrimination against Higdon to refuse to perform the service for him at the price charged to others for a like service. Union Pacific R. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 896; Alabama & V. R. Co. v. Railroad Commission, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. Ed. 289. If the appellee company had confined the transfer service to such service as was incidental to transferring cars of freight to and from its depot to mills and industries, there would be much force in the contention of counsel; but, as it did not pursue this course of conduct, we must treat the case as we find it and as it was made by the appellee company. The rate as published covered all service, and did not specify what character of freight it applied to, or make any distinction between corn and coal. If, under this rate, it was obliged to or did in its course of dealing, transfer wheat, corn, or other produce for certain persons from one point in Henderson to another, then it was obliged to perform this service upon the same terms and conditions for all persons demanding it, without reference to the class of freight hauled. Constitution, §§ 214, 215. In the absence of a tariff or rate classification by the appellee company, we cannot say that a higher rate should be charged for hauling coal than should be charged for hauling corn or wheat. Further insisting on its right to make a distinction between these articles and to support the contention that the published rate was not intended to and did not apply to coal, it is said that, when it hauled a car of freight from a mill or industry or from one industry to another in Henderson, it did so with the expectation that the freight so transferred would be converted into some article by the mill or industry receiving it and then shipped to points out of Henderson over its line, thus giving it what it calls a transportation haul or a haul out of which it would be compensated for the transfer service from factory to mill. This contention is entirely lacking in merit. It might be argued with as much force and relevancy to the issue that, as the mills could not be operated without coal, therefore it should haul coal from the mine to the mill so that produce might be manufactured that the appellee company could haul to points outside of Henderson.

We have examined the case of Dixon v. Central of Georgia R. Co., 110 Ga. 173, 35 S. E. 369, but do not find it applicable to the state of facts presented by the record before us. In that case the question before the court was whether or not the service was "transportation service" or "switching service," and under the facts of that case it was held to be "transportation service," and therefore the charge established for "switching service" was not applicable. In the case we have, our conclusion that the rate of $4 per car was applicable to the service demanded, although it is described in the tariff sheet as "switching service," is largely rested upon the ground that the company charged this rate to other shippers for a like service. In the Dixon case it does not appear that the question that influenced our decision upon this point was before the court. If the question of the applicability of the tariff rate we have quoted was submitted to us freed from the construction given to it by the appellee company in its dealings with reference to the transfer of freight between other industries, we would say that it did not apply to the service sought by

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Higdon. It seems to us that the service Higdon desired was not "switching" but "transportation" service. It was the same kind of service that the appellee company would have performed if a car was loaded with coal at a mine at any point on its road, and then hauled to the customer to whom it was consigned. But the appellee company in its course of conduct treated what might properly be called "transportation service" as "switching service," and applied to it the rate it now claims is only applicable to "switching service." This being so, we again repeat that it cannot be allowed to make any discrimination between Higdon and others similarly situated.

Coming now to the amount of damages Higdon is entitled to recover: He had two contracts with the Keystone company. In one contract, dated April 5, 1908, it agreed to furnish to him during the year not more than 20,000 tons, and it was in reliance upon this contract and the $4 rate he anticipated the appellee company would charge that he contracted to furnish to various industries about 14,000 tons. He also had other contracts to furnish coal to industries having spur connections, made before the contract with the coal mine, that it appears he could have filled with its coal. By the terms of the other contract, made in May, 1908, the Keystone company appointed Higdon its sole agent in the city of Henderson to sell for it in the city coal in car load lots. But this contract stipulated that: "The first party (Keystone company) does not obligate itself to furnish for or on account of the second party (Higdon) under this contract any given quantity of coal, nor shall it be required to furnish any coal which shall interfere with the supply of coal on the local market in less than car load lots or by wagon loads. It being the mutual understanding that the first party shall supply its local trade by wagon delivery, shall fill the contract made with the Crescent Coal Company, signed by said Joe Higdon, and if then it has any coal on hand the said Joe Higdon shall have the refusal and the first party shall not have any right to ship it elsewhere if the second party should desire to use it under this contract in carload lots."

It will be observed that it was virtually optional with the Keystone company whether it furnished Higdon any coal under the May, 1908, contract, and upon the record before us we do not think he is entitled to any damages under this contract, as it does not appear that on the faith of it he made any contracts that caused him to suffer any loss. On the contract made in April he is entitled to recover the difference between what it cost him to fill the contracts he had made, whether before or after July 1, 1908, with industries having spur connections, and that he could have filled with coal from the Keystone mine between July 1, 1908, and July 1, 1909, and what it would have cost him to fill these contracts if he had obtained coal from this mine. As it appears that this mine ceased operations before July 1, 1909, the damage should be confined to the quantity of coal that the Keystone mine could have supplied under the contract before it ceased operations, and that he could have furnished in fulfillment of the contracts made with customers before that time. Upon these issues the appellant was entitled to a jury trial.

Wherefore the judgment is reversed for a new trial in conformity with this opinion.

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Decision No. 1403.

MOORE v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa. May 12, 1911.)

131 N. W. 30.

CARRIERS — EVIDENCE.

A carrier, receiving for transportation live stock in good condition, has the burden of proving that its failure to deliver the same in good condition was due to some inevitable accident, or disease, weakness or other defect inhering in the stock, and not chargeable to any want of due care on its part.

In an action against a carrier of sheep for failure to deliver the sheep in good condition, evidence held to justify a finding that it failed to exercise due care on its part.

The fact that an owner of sheep was guilty of contributory negligence in overcrowding a car for their transportation did not relieve the carrier from liability for its negligence in keeping the car, without unloading, an unreasonable length of time at a feeding station.

Where a carrier's yardmaster testified to the arrival of a car load of sheep at a feeding station and to their condition, and stated that he had charge of the hauling of cars and the making up of trains, his answer to a question as to how many sheep a double-decked car would ordinarily hold that it depended on the size of the sheep, but thought about 200, was not objectionable as a conclusion of the witness.

The jury is not bound by the undisputed testimony of expert witnesses, but it may not arbitrarily reject such testimony, but must consider it as it appeals to the intelligent and impartial minds of the jurors, in view of the facts and the common knowledge of mankind.

Appeal from District Court, Franklin county; R. M. Wright, Judge.

Action to recover damages for the alleged loss of plaintiff's sheep while in the possession of the defendant as a common carrier. Verdict and judgment for plaintiff, and defendant appeals. Modified and affirmed.

Carroll Wright, J. L. Parrish, J. H. Johnson, and C. F. Johnson, for appellant. E. P. Andrews, for appellee.

WEAVER, J. On September 12, 1908, plaintiff purchased 307 sheep from Hill & Son, a firm of dealers or commission men at South Omaha, Neb., for shipment to his farm or place of business at Elkton, S. D. When the purchase was made, the sheep were taken from the pens of the seller and turned over to the stockyards company, through which such shipments are made from South Omaha, the consignment being made by Hill & Son, to be shipped over the defendant road to Elkton. The delivery to the stockyards company was made about 4 o'clock P. M. of September 12th. They were not loaded upon the car until 10.40 o'clock A. M. of September 14th, having meanwhile been "dipped" in obedience to some regulation imposed by federal law upon such shipments. The car was hauled from Omaha east to Valley Junction, Iowa; thence north to Sibley, Iowa, where the sheep

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were transferred to another car, which was huled westward to Elkton, S. D., arriving there at 5.50 o'clock P. M. of September 17, 1908. Many of the sheep died en route, and but 85 were delivered alive to plaintiff. Alleging facts as aforesaid, the plaintiff sues to recover damages. The defendant's answer is in substance a general denial of all the allegations of the petition. The plaintiff's evidence was to the effect that the sheep, if safely delivered at Elkton, would have been worth $3.50 per head at that place. The verdict in his favor was for $256.65.

(1) 1. While many exceptions are presented and argued, the one most prominently asserted goes to the sufficiency of the evidence to sustain the verdict, and to that we give first attention. Plaintiff's testimony tended to show a delivery of the sheep in good condition. He conceded, as a witness, that they were thin in flesh, having been recently separated from their lambs, but says "they were a good, ordinary bunch of ewes." In this he is corroborated by other witnesses. Assuming, therefore, that the jury would be justified in believing this testimony, the burden was upon the defendant as a common carrier to show by a preponderance of the evidence that its failure to deliver the sheep safely at Elkton was due to some inevitable accident, or disease, weakness, or other defect inhering or existing in them, and not chargeable to any want of due care on its part. McCoy v. Railroad Co., 44 Iowa 424; Kinnick v. Railroad Co., 69 Iowa, 665, 29 N. W. 772; Swiney v. Express Co., 144 Iowa 342, 115 N. W. 212; Railroad Co. v. Williams, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289; Railroad Co. v. Fox, 113 Ill. App. 180; Railroad Co. v. Woodard, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Cooper v. Railroad Co., 110 Ga. 659, 36 S. E. 240; Express v. Ashford, 126 Ala. 591, 28 South. 732.

(2) The question before us on this branch of the case is therefore whether the defense upon which appellant relies has been so clearly and satisfactorily established as to leave no room for a different conclusion upon the part of intelligent, fair-minded jurors. Such is not our conclusion from the record. It is true that plaintiff's claim that the sheep were in reasonably good condition when delivered is vigorously contested by the defendant, and it offers a strong array of evidence tending to show that the animals were the culled remnant of a larger flock from which the more valuable portion had been before selected and sold; that from four to six died in the yard before the car was loaded; that on arrival at Valley Junction more were found dead; that a disease of some kind seemed to develop among them; that others were found dead on arrival at Sibley, and still others died between Sibley and Elkton. It would appear from the record that this showing did convince the jury that the loss of a portion of the sheep was chargeable to causes for which a carrier is not held responsible, for the testimony is without substantial dispute that, had the sheep been delivered at Elkton in good order, they would have been worth $3.50 per head. According to his showing, plaintiff lost 222 sheep, and defendant's showing makes the number 216, but the verdict returned of $256.65 indicates that the jury found the defendant's liability did not extend to the entire loss.

As to the circumstances attending the transportation and care of the shipment, it is shown that the train in which the sheep were

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hauled to Valley Junction, where they were to be unloaded, fed, and watered, arrived there about 7 o'clock P. M. of September 14th, but they were permitted to remain in the car all night. The sheep were all in one double-decked car, and the weather quite warm. When unloaded in the morning, 20 were found dead, and others showed signs of weakness. They remained in the yard until evening, when they were reloaded, and at 4.10 A. M. next day were started on the journey to Sibley, the next feeding point, where they arrived at 5.30 o'clock P. M. While in the yard at Valley Junction, several witnesses say the sheep, or many of them, appeared to be suffering from dysentery or other disease of the bowels, and several died there. At Sibley many others were found dead. The remnant was unloaded, fed, and transferred to another car. The trip thence to Elkton was accomplished in about four hours. It is the claim of plaintiff that the defendant was negligent in keeping the crowded car, without unloading, on its tracks at Valley Junction an unreasonable length of time, and that the jury may well have believed that the disease, if any, of which the sheep died was developed by this treatment, or if the sheep were in any manner affected by the disease when shipped that such treatment operated to aggravate its effect, and the mortality resulted therefrom. We are unable to say that this is not an allowable inference from the facts shown.

(3) If the car was overloaded or overcrowded, and plaintiff be held to have no cause of action on that account, by reason of contributory negligence in respect thereto, it would not relieve the defendant from liability for its negligence, if any, to keep the car, without unloading, an unreasonable length of time at the feeding station. Other circumstances are relied upon by plaintiff in rebuttal of the claim that the defense has been established as a matter of law, but we will not prolong the opinion to discuss them in detail. It is enough to say that, in view of the entire case as disclosed by the record, the trial court did not err in denying the motion for a directed verdict.

(4) (2) Complaint is made that the court ruled out evidence as to the difficulty of unloading sheep in the nighttime. While there may be circumstances under which the evidence offered would be material and competent, we are of the opinion there was no error in the ruling.

(5) The train arrived at Valley Junction at 7 o'clock P. M. on September 14th, a time of the year when we will take judicial notice that the darkness of night had scarcely set in. Instead of promptly placing the car in position for unloading, it was not moved to the sheep pens until 1 o'clock in the morning, and it was not until the car was so placed that any attempt was made to unload it, and the alleged difficulty encountered. There was no prejudice to the defendant in rejecting the evidence.

(6) It appears, moreover, that while testimony of this nature by some witnesses was ruled out, defendant succeeded in getting it before the jury in evidence given by other witnesses.

(7) Defendant's yardmaster, Heggenberger, having testified to the arrival of the sheep at Valley Junction and their condition, and that he had charge of the hauling of cars and the making up of trains, was asked how many sheep a double-decked car would ordinarily hold, and, having answered it would depend upon the size of the sheep, was

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permitted to say that he had never loaded sheep, but thought "about 200, or about that." This was objected to on the sole ground that the witness had not shown himself competent to answer, and that the testimony called for was a mere matter of opinion or conclusion. Counsel now argue their exception to this evidence on the theory that it was not proper cross-examination. No such objection was raised below, and we think the testimony was not fairly open to the objection which was in fact made.

(8) (3) Two witnesses, veterinary surgeons, testified on behalf of the defendant that they were called to the Valley Junction yards on September 15, 1908, to examine a lot of sheep. They described the appearance of the sick animals and the symptoms manifested and the conditions of the internal organs of some of the carcasses, and gave it as their opinion that the sheep were suffering from "gastral enteritis," or "acute congestion or hyperemia," affecting the functions of the bowels, bladder, and kidneys. The disease, they say, is not contagious, and is "probably" produced by a change of diet.

Bearing upon the weight to be given expert evidence, the court instructed the jury as follows: "(10½) Testimony has been given by certain witnesses who, in law, are termed experts, and in this connection I would suggest to you that, while in cases such as the one being tried, the law receives the evidence of men, expert in certain lines, as to their opinions derived from their knowldege of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment to that of any person testifying as an expert witness, or to give controlling effect to the opinion of scientific witnesses; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to; but you are not bound or concluded by the testimony of any witness, expert or other."

Upon this feature of the record we are asked to say that, as plaintiff produced no witnesses to take issue with the defendant's experts, their testimony is to be taken as conclusively establishing the defense, and that there was error in giving the quoted instruction. We admit, for the purposes of this case, that upon issues which turn solely and entirely upon the answer to some scientific or technical question concerning which the ordinary or unskilled person can have no proper or adequate conception, and where the testimony is wholly of an expert character and without dispute, the jury is bound by it, and the court may control the verdict. But such cases are by no means usual or common, and in all ordinary cases the rule laid down in the instruction criticized is sound. Morrow v. Association, 125 Iowa 639, 101 N. W. 468; Arndt v. Hosford, 82 Iowa 502, 48 N. W. 981; Ætna Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371; Railroad Co. v. Whitney, 143 Iowa 516, 121 N. W. 1043; Salinger v. Telegraph Co., 126 N. W. 365.

(9) The jury does not sit simply to register the opinion of an expert witness, even though it be undisputed. It is its own exclusive function to pass upon the fact put in issue. The testimony of the expert may not be arbitrarily rejected, but, like the evidence of every other

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witness, it is to be considered by the jurors, who are to accord to it influence, much or little, according as it appeals to their intelligent and impartial minds, in view of all the facts and circumstances developed upon the trial and the common knowledge and experience of mankind. Nor is the instruction subject to criticism as tending to belittle expert evidence. On the contrary, the only effect is to prevent the undue exaltation of such evidence, and to place the expert witness on equal footing with all other witnesses, whose testimony must be subjected to the final test of the judgment of the jury.

(10)(4) Error is assigned upon the alleged misconduct of appellee's counsel in his argument to the jury. We find no error in this respect. Counsel has the right to draw conclusions from the testimony and give them to the jury, even though his logic may be at fault, or the opinions expressed by him be unjust. So long as he does not go outside of the record in a manner from which we may fairly infer prejudice to the other party, and does not abuse his privilege by appealing to prejudice and passion, rather than to reason, the field is his own, and the court should not interfere. We find nothing in the argument here objected to which seems to be obnoxious to this rule or to call for the drastic remedy of ordering a new trial.

(11) (5) At the term at which this action was first tried, plaintiff came from a distant State, and procured the attendance of his counsel and witnesses ready for trial. Defendant appeared and moved for a continuance on the ground of sickness occurring in the family of one of its counsel, upon whom it had relied to conduct the litigation. The court granted the motion and taxed defendant the sum of $57.80 to cover costs and expenses incurred by plaintiff in attending with his witnesses upon this term. Later the amount was reduced by eliminating an amount of three dollars. Error is assigned upon the refusal of the court to retax the entire amount. This question was before us in the recent case of Keller v. Harrison, 128 N. W. 851 (supplemental opinion filed at the present term of court), where it was held erroneous to impose other conditions, upon the granting of a motion for continuance, than the payment of taxable costs. For reasons indicated in my dissent from that ruling, I incline to the view that power to require the payment of expenses, rendered useless by a continuance asked for on the very eve of trial, as a condition of granting such request, is not only inherent in the court and one sanctioned by universal practice, but is quite essential to the due administration of justice. However, as the majority of the court sees no sufficient reason for departing from the precedent thus established, it must here be followed, and the objection to the taxation against defendant of expenses other than taxable costs will be sustained accordingly.

There being no reversible error involving the merits of the case, the judgment below (modified as herein directed in the matter of taxation of costs) must be affirmed at the cost of the appellant.

Affirmed.

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Decision No. 1404.

SULLIVAN-SANFORD LUMBER CO. v. WATSON et al.

(Court of Civil Appeals of Texas. Feb. 2, 1911. On Rehearing, March 16, 1911.)

135 S. W. 635.

CARRIERS — COURTS — NEGLIGENCE.

Where plaintiff's decedent was riding on a car in defendant's logging train, the defendant at least owed him ordinary care to transport him safely, unless it was released by the contract of passage.

In an action against a railroad company for injuries in a collision causing death, where deceased was riding on a pass, in which there was a stipulation that he waived all claims for damages in case of injuries from any cause, such agreement was against public policy, and defendant, though a private carrier, was liable for injuries caused by its negligence.

Where there is a conflict between decisions of the Supreme Court of the United States and those of the Supreme Court of a State upon a question of domestic policy, the latter should furnish the rule for guidance of the courts of the State.

While the right of contract is sacred, it is not absolute, but must be exercised in subordination to laws which have for their object the preservation of rights still more sacred, and the law has imposed upon a carrier, though not a common carrier, the duty to exercise a high degree of care for the safety of their passengers, and from the performance of this duty no contract can relieve the carrier.

"Ordinary care" is that measure of prudence universally exacted in all the lawful relations of life, except where, from other considerations, a higher degree of caution is enjoined.

Appeal from District Court, Morris County; P. A. Turner, Judge.

Action by Mrs. Beulah Watson and others against the Sullivan-Sanford Lumber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chas. S. Todd, for appellant. J. M. Terrell and Hart, Mahaffey & Thomas, for appellees.

HODGES, J. At the time of the institution of this suit, and prior thereto, the appellant, Sullivan-Sanford Lumber Company, was a private corporation engaged in the business of manufacturing and selling lumber at Naples in Morris county, Texas. In addition to its mill and machinery, appellant also owned timber situated on lands some distance in the country, from which it obtained its supply of logs and material for carrying on its business. For the purpose of transporting logs from the forest to its mill at Naples, it had constructed a railroad extending from the latter place about sixteen miles in length to its timber lands. This railroad was in all material respects similar to the ususal standard gauge railroads constructed and used by the common carriers of the country. In operating this railroad two ordinary railway locomotives, and cars adapted to the business carried on, were used. No passengers were carried except the employees of

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appellant and those engaged in cutting timber, or some one seeking employment from the timber contractor. Nor was any freight carried except that belonging to the appellant, or to its timber contractor. It was customary for what is called the "log train" to make daily trips, going out in the morning and returning in the evening; and on this train those who were entitled to passage were transported. Persons other than employees who desired passage were given a permit or pass for which no charge was made. Such permits contained the following stipulation: "The user of this pass rides only on the following conditions: (1) This permit is accepted with the understanding that the person using it assumes all risk of injury of any character while using the same and hereby waives any claim for damages in case of injury. (2) The Sullivan-Sanford Lumber Company's railroad is not a common carrier and does not transport passengers for hire, but only carries its own officers and employees to and from their work for their own convenience and without charge. [Signature] ————." In July, 1909, J. A. Watson, who was not an employee, but was returning from a search for employment, was killed in a collision while riding on appellant's log train; and this suit was instituted by his surviving wife and children to recover damages resulting from his death.

The facts show that on the morning of the day of his death Watson went to appellant's mill at Naples, seeking employment. He found none, but was referred to J. H. Findley, an independent contractor, who had established a logging camp upon appellant's lands and was engaged in cutting and supplying the mill with logs. Desiring to apply to Findley for work, Watson obtained from Lockridge, appellant's general manager, a permit, or pass, to go out that morning on the log train to Findley's camp. Upon reaching that place he was again unsuccessful in finding employment, and decided to return on the same train that evening. He was furnished by Findley, who, it seems, was authoried to do so, with another permit, or pass, entitling him to ride on that train to Naples. Both the pass issued by Findley and that given by Lockridge in the morning contained the usual stipulations heretofore referred to as embraced in permits to ride over that road. Besides Watson, the train upon that occasion carried as passengers Findley and some of his employees. It left the camp some later than usual, and was still further delayed en route by conditions not necessary to here notice. Although due at Naples at 6 P. M., it had not arrived three hours later. About 9 o'clock that night appellant's general manager, J. W. Lockridge, Martin Sullivan, its acting secretary and treasurer, and some of the employees, boarded a locomotive used about the mill for switching purposes, and started out in search of the delayed train. The night was dark, and the railroad contained a number of curves. The engine pulling the train upon which Watson was riding was being run without any headlight, on account of the defective condition of the lamp provided for that purpose. The locomotive upon which Lockridge and his party were riding was moving backwards and upon the same track on which the train coming from the camp was running. The only light provided on it was a lantern held by one of the men sitting on the rear of the tender. The locomotive proceeded at a rather slow rate of speed,

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whistled for a crossing just as it was passing out of the yards, but gave no other signals thereafter. When this party had reached a point estimated at from one-fourth to one-half of a mile from the mill, the locomotive collided with the belated train. The engineer on that train was not expecting to meet any such obstruction, and was traveling at the rate of about fifteen or twenty miles per hour. The collision was so violent that it practically demolished one of them, derailed several of the cars, killed Watson and one of the employees, and injured others. The proximity of the two locomotives was not discovered by those operating them till so near together that a collision was unavoidable. There was evidence tending to show that the log train was not equipped with brakes sufficient to enable those in charge to make a quick stop; that the engineer had never been over the road before that day, and knew nothing about the condition of the track.

Martin Sullivan was made a party defendant in the suit. The petition, among other things, charged negligence in the following particulars: In placing in charge of the log train an inexperienced engineer, failing to provide a headlight and brakes for that train, and in running on the same track the locomotive with which the train collided.

The defendants answered separately, the appellant, Sullivan-Sanford Lumber Company, pleading, after demurrer and exceptions and general denial: (1) Contributory negligence and unanticipated inevitable accident; (2) that as a private corporation it was not liable under the statute for the negligence of its servants and agents for injuries resulting in death; and (3) that the deceased, Watson, by contract, verbal and in writing, expressly assumed all risk of injury or death, and expressly waived any and all claim for damages. On a trial before a jury, a verdict was rendered in favor of the defendant Martin Sullivan, and against the Sullivan-Sanford Lumber Company for $8,750.

The principal ground relied on for a reversal of this case is the refusal of the court to recognize as a valid defense the stipulation in the pass on which Watson was riding at the time he was killed, by which he assumed all risk of injury and waived any claim for damages. It is contended that the appellant was not a common carrier, and therefore had the right to contract with Watson for exemption from liability for injury resulting from its negligence and that of its servants. It is claimed that the legal effect of the conditions embraced in the pass issued to Watson, and agreed to by him, was to entirely relieve the appellant from any liability for such injuries, and hence the court erred, not only in submitting the issue of negligence as a basis of recovery, but in refusing to gave a peremptory instruction in favor of the defendants in the suit. This feature of the appellant's defense was met with the proposition that the stipulation contained in the pass, in so far as it might be construed as exempting the appellant from liability on account of its negligence or that of its employees, was void on the ground that it was opposed to the public policy of this State. The trial court adopted that view of the law and formulated his charge to the jury accordingly. Counsel for appellant does not in his brief contend that the testimony was not sufficient to establish negligence as the direct cause of Watson's death.

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For the purpose of this discussion it may be conceded that under the evidence the appellant was not a common carrier, and that the question of its liability should not be determined by the rules of law applicable exclusively to that class of transporting agencies. It was, however, upon this particular occasion performing the services of a private carrier, and as such had undertaken to transport Watson as a passenger to his destination. Unless it had been released therefrom by the terms of the contract pleaded, it owed Watson the duty of exercising at least ordinary care for his safety while he was a passenger upon its train.

"The public policy of the government is to be found in its statutes; and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials. But, when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.' United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. See also People v. Shedd, 241 Ill. 155, 89 N. E. 332.

It is one of the primary duties of the State to provide for the personal security of the lives of its citizens. In the performance of that duty the legislature of this State has enacted various statutes defining culpable homicide and providing appropriate penalties for their violation. Among other provisions relative to this subject, our Penal Code contains the following:

"Art. 651. Homicide is the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another."

"Art. 681. Homicide is excusable when the death of a human being happens by accident or misfortune, though caused by the act of another who is in the prosecution of a lawful object by a lawful means."

"Art. 684. If any person in the performance of a lawful act shall by negligence and carelessness cause the death of another, he is guilty of negligent homicide of the first degree."

"Art. 686. To constitute this offense there must be an apparent danger of causing the death of the person killed, or some other.

"Art. 687. The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances."

"Art. 689. To bring the offense within the definition of homicide by negligence either of the first or second degree, there must be no apparent intention to kill.

"Art. 690. The homicide must be the consequence of the act done or attempted to be done.

"Art. 691. Negligent homicide of the first degree shall be punished by confinement to the county jail not exceeding one year, or by fine not exceeding one thousand dollars."

We have in the foregoing a positive declaration of the lawmaking power as to the policy of this State with reference to protecting life against the negligent conduct of others. A homicide caused by negligence, while not punished with the same severity, is as much a viola-

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tion of the statutes of this State as those which result from culpable motives. It is not contended, nor do we think it could be done with any show of reason, that the death of Watson was not one of the natural consequences which might have been expected to follow from the conduct relied on to show negligence in this case. Traveling on railroad trains running at the usual rates of speed is always attended with more or less of danger to life and limb. When two trains move in opposite directions upon the same track under the conditions disclosed by the evidence in this case, a collision and death to those on board might well be considered among the consequences likely to follow.

We come now to the pivotal question: Could Watson in advance by contract release the appellant from its civil liability for an injury resulting in his death caused by its negligence or by that of its servants? As supporting that right, counsel for appellant refer to decisions of the Supreme Court of the United States and of many other States in which similar stipulations for exemption from liability for the negligence of the carrier are held valid. The leading cases relied on are: B. & O. S. W. Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and N. P. Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513. In the first case referred to, Voigt, the injured party, was an express messenger riding in a car set apart for the use of an express company, and was injured by the negligence of the railway company by which the car was being transported. There was an agreement between the two companies that the express company would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employees. Voigt, when entering into the employ of the express company, signed a contract in writing whereby he agreed to assume all risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employes. In rendering the opinion Mr. Justice Shiras said: "Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter in pursuance of the contract between the companies, was not a passenger within the meaning of the case of New York C. R. Ry. Co. v. Lockwood, 17 Wall. 357 [21 L. Ed. 627]; that he was not constrained to enter into the coitract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy." That decision has since been followed and approved by the same court and by several courts of last resort in different States in the Union.

The Adams case was one in which a passenger was injured while traveling on a free pass and sought to recover damages for injuries resulting from the negligence of the carrier. The defense was that the carrier was released by a contract stipulating that it should not be liable for its negligence or that of its servants. After referring to the

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Voigt case and quoting a portion of the opinion, the court said: "In the light of this decision but one answer can be made to the question. The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby." The appeal in that case was from a judgment rendered in the United States Circuit Court for the District of Washington. The opposite rule has been adopted by the courts in Mississippi, Alabama, Iowa, Minnesota, Missouri, Arkansas, and Pennsylvania. See notes to Y. & M. V. Ry. Co. v. Grant, 4 Am. & Eng. Ann. Cas. 556, where the authorities on both sides of the question are collated and discussed.

As also opposing the doctrine announced in the two federal cases, we are referred to the case of Railway Co. v. McGown, 65 Tex. 643. McGown was also a passenger using a free pass which contained a stipulation releasing the railway company from liability for injuries resulting from its negligence or that of its servants. He was injured by the derailment of the train and sued for damages. Among other defenses, the railway company pleaded the contract of exemption. This defense was attacked on the ground that it was void because opposed to public policy. In a well-considered opinion by Chief Justice Stayton this contention was sustained. In discussing that question he said: "The relation of passenger and carrier is created by contract, express or implied, but it does not follow from this that the extent of liability or responsibility of the carrier is, in any respect, dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please; but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the course thereof; and this is so for the public good. Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern.

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None could be of greater public concern, at the present day, than these employments by which men, women, and children are transported by millions, by agencies of a most dangerous character, and with a speed heretofore unknown. As said in Railway Co. v. Derby [14 How. 468, 14 L. Ed. 502]: "This duty does not result alone from the consideration paid. It is imposed by the law, even where the service is gratuitous. The confidence induced by the undertaking of any service for another is a sufficient legal consideration to create a duty in the performance of it.' Railroad Co. v. Wier, 37 Mich. 115 [26 Am. Rep. 499.]." In a decision of comparatively recent date the Supreme Court of Virginia has announced a similar holding. N. & W. Ry. Co. v. Tanner, 100 Va. 393, 41 S. E. 721.

In case of conflict between the decisions of the Supreme Court of the United States and that of our own State upon a question of domestic policy, we think the latter should furnish the rule for our guidance. Each State by virtue of its local sovereignty has the righ to adopt its own policy for the regulation of its internal affairs, so long as in doing so it does not invade rights protected by the Constitution of the United States. Subject to that limitation, it has the power, when deemed essential to the protection of the public welfare, to determine that certain classes of contracts shall not be entered into, or, if made, shall be uninforceable.

While the rule announced in the McGown case has not, so far as we have been able to ascertain, been applied in determining the validity of similar contracts entered into with private carriers, or private parties other than employers, yet we feel that the principle upon which it is based, together with the statutory provisions before referred to, justify the conclusion that the public policy of this State forbids the making of a contract whereby one may escape the civil consequences of his negligence. Watson and his dependent ones were not the only parties interested in the preservation of his life; but the State, as the representative of the public at large, was also concerned in safeguarding him against dangers likely to result in his death. When the sovereign in providing for the public security of its citizens declares that a certain grade of negligent conduct shall be unlawful, no other has the power to make it lawful. When the law imposes a duty for the public good, no private contract can remove the obligation.

The right of contract is sacred; but it is not absolute. It must be exercised in subordination to laws which have for their object the preservation of rights still more sacred. The law has imposed upon common carriers the duty of exercising a high degree of care for the safety of their passengers. From the performance of this duty no contract can relieve the carrier. It is likewise made the duty of every person to exercise ordinary care to avoid destroying the life of another. Upon what ground can it be said that this latter duty may be contracted away? In each case the obligation is imposed for the public security and in pursuance of a sound public policy. We are unable to perceive the logic of the rule that would make one the subject-matter of contract and exclude the other.

It is contended that Watson was admitted as a passenger solely for his own accommodation, and was paying nothing for the service he

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was receiving. In both the McGown and Tanner cases before referred to the transportation was being gratuitously performed; but the courts held that that fact did not alter the rule. It would indeed be a barbarous law that would permit a carrier whose negligence had caused the death of a passenger to defend its wrong by proving that the transportation was to be without charge. Such a defense might be good against a complaint that the transportation had not been completed, but not against the charge that the passenger had by the negligence of the carrier been placed in a worse condition than before his transportation was undertaken. While the failure to exercise ordinary care to prevent injury to another may in some instances be properly regarded as a breach of a contractual duty, it does not rest upon contract alone, but finds its ultimate basis in an imperative requirement of the law, dictated by a sound public policy. "Ordinary care" is that measure of prudence universally exacted in all the lawful relations of life, except where, from other considerations, a higher degree of caution is enjoined. One person owes it to another when mingling in social contact; when pursuing the usual avocations, whether engaged in separate, or common, employment; when meeting as strangers on the highway, or coming together in the tumult of public assemblies. It clings to the individual in every walk of life, enters every grade of service, and is written in every obligation assumed. The duty exists where contracts cannot bind; it rests upon the infant as well as the adult, and in many cases upon the insane as well as the sane. One who takes passage upon a railway train necessarily places himself largely at the mercy of the carrier and its servants, and must depend for his safety upon their prudence and caution. That situation strengthens the cogency of the reasons upon which the requirement to exercise at least ordinary care is founded.

It may be said that, if Watson had been fatally injured, but had survived long enough, he might have made a contract releasing the appellant from its liability for the damages caused, and that such a contract would have been binding on his wife and children after his death. This being correct, it may then be asked: Why could he not in advance make a contract equally as binding? If one does not contravene public policy, why should the other? Without reference to the consideration which may operate as the inducing cause for entering into such contracts either before or after injury, the distinction lies in the difference between their legal and practical effects. A contract of release executed after injury simply extinguishes an existing liability. One executed in advance grants an immunity, and thereby confers a license to inflict the injury, and in this way tempts the perpetration of a legal wrong. The imposition of civil liability as the consequence of negligent conduct resulting in death, or serious bodily injury, may justly be regarded as only a part of the method adopted by governments for discouraging that species of wrongdoing. Compensation is generally considered the purpose of the law, largely, perhaps, because it measures the extent of the liability. If compensation is the only object, why not permit a recovery in all cases where such injuries occur? The damage is just as great whether the injury be innocently or wilfully inflicted. If the remedy is not in part, at least, to discourage a wrong, why limit it to cases where the wrong is the cause?

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According to our interpretation the public policy of this State is opposed to the character of contract interposed as a defense in this case. Watson could not agree that another might take his life in a way which the law has condemned as culpable and punishable.

The proposition discussed being the only question presented for review, and finding no error, the judgment should be affirmed.

On Rehearing.

Appellant calls attention to the case of M., K. & T. Ry. Co. v. Carter, 95 Tex. 461, 68 S. W. 159. This case was cited in the brief of counsel for appellant, but was not referred to nor discussed by us in the original opinion, because we did not think it should be considered as relevant authority upon the proposition here involved. The facts of that case show that Carter & Bros. were the owners of a sawmill and planing plant situated on a lot adjoining a spur track of the railway company. Their plant, together with a stock of lumber, were burned under circumstances from which it might have been inferred that the fire was due to sparks escaping from a locomotive belonging to the railway company. Carter sued for damages, alleging negligence on the part of the railway company in failing to properly equip its locomotive with a sufficient spark arrester, and on the part of the servants of the railway company in its operation upon that occasion. Among other defenses, the railway company relied upon a contract by which they were released from any liability for damages resulting from such conduct. The contract recited an agreement by which the railway company was to build the spur track a distance of about seventy feet from the main line at the point where Carter's plant was situated, and that it was done for the latter's convenience in shipping lumber and other freight. It is then provided that, in consideration of the premises and of the construction of that side track and switch, the owner of the mill released the railway company from all damages and claims arising from the injuring or killing of stock belonging to him, or his contractors, or employees, or that might be injured or killed by locomotives or trains or cars of the railway company on the line of the road or on its tracks, and for all damages resulting from the injury or destruction of any property whatever that might be injured or destroyed by fire or sparks from any locomotive of the railway company at or about that switch. In reply Carter sought to evade the force of that contract by attacking its validity on the ground that it was opposed to public policy, in that it was a contract exempting a common carrier from the consequences of its negligence. While the case was pending in the Court of Civil Appeals, that question and others were certified to the Supreme Court. Justice Brown, in an opinion sustaining the validity of the contract, says: "A railroad company, when not contracting in its character of common carrier, has the same right of contract as other corporations or persons, and in many instances may make contracts for immunity from liability on account of the negligence of itself and servants." After referring to a number of authorities, among which are included what are commonly called the "Express Company Cases," decided by the Supreme Court of the United States, he continues: "We can see no reason why the contract in this case should

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be forbidden that does not apply with equal force to the cases cited. There being no general rule of public policy which will condemn this contract, the inquiry then arises: Is there in the State of Texas any such policy indicated, either by statutory provision, its Constitution, or judicial decisions, as would establish a right in the public inconsistent with the tems of this contract?" After discussing the principles underlying the proposition, he then says: "We conclude that the contract certified is not violative of the public policy of the State, but is a legitimate exercise of the liberty of contract, by which the appellees voluntarily, and for the purpose of securing the convenience of the railroad at that point, agreed to release the railroad company from liability for injury which might occur to their property by the negligence of the employees of the railroad, or by such unavoidable accident as is frequent by the escaping of fire from the best equipped machinery."

The effect of that decision is to say that one not a common carrier, and even a common carrier itself when not contracting as such, may by contract secure immunity from liability for damages resulting from its negligence or that of its servants. The distinction between that case and the one before us lies in the difference between property and human life. When considered as an object of governmental protection, these are not to be put in the same class. The protection vouch-safed to one in the enjoyment of his property is that he shall not be deprived of it without his consent, except in some manner pointed out in law. It is given for the personal benefit of the property owner. All conduct resulting in injury to one's property or property rights is deemed wrongful only when in opposition to the consent of the owner. The owner alone, in the eyes of the law, has the right to complain of such injury. But not so with respect to the lives of individuals. In the preservation of these the public at large has an interest. Conduct which results in the destruction of life is not relieved in its culpability by the consent of the victim previously obtained, or by his condonation thereafter given. If the guaranty of public security sought to be made effective by prohibitory legislation is one of the essential and primary duties of government, the observation of the regulations and restrictions imposed for that purpose become the duty of every citizen within the State. If it is made a personal offense to negligently kill another, then it follows that the duty to observe ordinary care not to kill is one imposed by law for the benefit of society. If this be true, can it then be said that this duty may be contracted away? Every tragic death is a shock to society as well as an injury to the individual. A contract, which provides that for a valuable consideration one may relax that degree of prudence and vigilance toward another which the law enjoins as a guaranty of personal security, necessarily contemplates the doing of something which the law for a wise purpose has forbidden. It is true that the penalty denounced by law for negligent homicide can be visited only upon the person guilty of the wrongful conduct; but civil courts broaden the range of responsibility and extend it to those whom the wrongdoer represents. In this case the principal is a corporation which can act only through its agents; but we do not think it could for that reason make this particular kind of a contract. We know of

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no reason why a contract, held to be void because opposed to public policy when made by a private person, should not be equally as offensive when entered into for the benefit of a private corporation. It is contended that, if the appellant could not contract for exemption from its own negligence, it could by that means secure immunity from liability for damages resulting from the negligence of its servants. We are not referred to any adjudicated case in which such a distinction has been made. The evidence shows that the collision which was the immediate cause of Watson's death was the result of conduct initiated by and carried on under the immediate direction of Lockridge, appellant's general manager. The case does not furnish an instance of an injury caused by the negligent conduct of some subordinate employee, but of the corporate representative himself, who, upon that occasion, stood in its stead. The act of Lockridge was the act of the company itself.

It may be that the conclusions we have reached in this case are not in harmony with those announced by very eminent authority; it is also possible that our views may not meet the approbation of the court of last resort in this State; but, be that as it may, we think the principles upon which we have rested our decision should be recognized as sound in law. So thoroughly are we impressed with the justness of that conclusion that we have determined that, if contracts of this character are to be held valid and binding obligations in this jurisdiction, they must receive their sanction at the hands of some other tribunal to whose mandates we are required to yield obedience.

The motion is overruled.

Decision No. 1405.

LIVERMORE FALLS TRUST & BANKING CO. v. RICHMOND MFG. CO. et al. (three cases).

PETTENGILL et al v. LIVERMORE FALLS TRUST & BANKING CO. et al.

(Supreme Judicial Court of Maine. May 9, 1911.)

79 Atl. 844.

CHATTEL MORTGAGES — NOTICE — PRINCIPAL AND SURETY.

The mortgagee in a chattel mortgage of the plant, tools, stock, etc., of a going manufacturing concern is not required by the law to give notice of its intention to take possession of the mortgaged property for breach of condition.

Such mortgagee upon taking possession of the mortgaged property is not required by the law to assume, perform, or complete then existing contracts of manufacture made by the mortgagor, however profitable they may be.

Though choses in action, like book accounts, are included in a chattel mortgage, they are not thereby made subject to the statutes governing chattel mortgages. As to them, the mortgage only operates as a pledge or equitable assignment, and the title to them does not become absolute in the mortgagee by a statutory foreclosure

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of the mortgage. He is not required by the law to collect them, and is accountable only for what he actually receives on them so long as he does not acquire an absolute title.

A mortgagee is not required by the law to pay off prior mortgages or existing liens, nor to perform conditions necessary to secure or perfect the title to any of the mortgaged property, even though the property is lost through the omission to do so.

Where a mortgage secures several debts due from the mortgagor to the mortgagee, and the mortgaged property is not sufficient to pay all the debts, the mortgagee upon foreclosure may elect to which of the debts the property shall be applied.

In such case, the bringing suit on some of the debts is an election to apply the mortgaged property to the other debts, those not put in suit.

Where some of the debts secured by a mortgage are also secured by sureties, the latter cannot require the application of the mortgaged property to such debts in preference to those debts secured only by the mortgage.

The sureties upon debts also secured by a mortgage cannot require the creditor to foreclose the mortgage upon condition broken, nor to follow up the foreclosure, if begun. The creditor may without their consent allow the debtor more than the statutory time for redemption after foreclosure is begun; and in such case he will be held to account only for the value of the property at the end of the extended time.

Report from Supreme Judicial Court, Androscoggin County, at Law.

Actions by the Livermore Falls Trust & Banking Company against the Richmond Manufacturing Company and others, and suit by Waldo Pettengill and others against the Livermore Falls Trust & Banking Company and others. The cases were tried together and reported to the law court. Remitted for the appointment of auditors to make and return findings on the evidence.

The three first-named cases were actions at law on certain promissory notes, while the last-named case was a bill in equity brought by the sureties on the notes sued in the actions at law against the plaintiff in the actions at law and the Richmond Manufacturing Company, praying for an injunction against the suits on the notes and for an accounting by the plaintiff in the actions at law which had taken possession of certain personal property under and by virtue of certain chattel mortgages given to it by the Richmond Manufacturing Company, and instituted foreclosure proceedings thereon. The general issue with a brief statement of special matter of defense was filed in each of the actions at law, and an answer with a demurrer therein inserted was filed by the Livermore Falls Trust & Banking Company in the equity suit.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, KING, and BIRD, JJ.

Frank W. Butler and Heath & Andrews, for Livermore Falls Trust & Banking Co. Bisbee & Parker and Newell & Skelton, for defendants in actions at law and plaintiffs in equity suit.

EMERY, C. J. From the evidence we find certain material facts to be as hereinafter stated:

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May 5, 1909, the Livermore Falls Trust & Banking Company (hereafter called the bank) held various promissory notes of the Richmond Manufacturing Company (a corporation engaged in the manufacture of wood novelties and hereinafter called the "company"), as follows:

A group of five notes aggregating $25,000, dated February 1, 1905, secured by a chattel mortgage, in the usual form, of all its tangible personal property, mills, machinery, tools, unmanufactured stock, manufactured goods, etc., a group of nine notes aggregating $26,000, and of various dates between February, 1905, and July, 1906, secured by a second chattel mortgage covering the same property, but made subject to the prior mortgage of February 1, 1905, and a group of notes dated subsequent to 1906. November 8, 1908, the company gave the bank a third mortgage of all its tangible personal property, and also of all its then existing book accounts, and such accounts as it should acquire from the sale of any of the personal property. The second and third mortgages were conditioned for the payment of all sums that were then or might thereafter be due the bank from the company. The second group of notes, the nine dated between February, 1905, and July, 1906, were signed by various individuals, in form as co-promissors, but really as sureties, as was well known to the bank.

The foregoing notes were all unpaid and overdue May 5, 1909, on which day the bank, without giving any notice of its intention, took possession of all the property covered by either of the three chattel mortgages, and on the 15th of the same month began due statutory proceedings for foreclosure of all of them. In the meantime, however, on the 10th of the same month, May, 1909, the bank began actions at law against all the parties on the nine notes signed by the individual sureties and secured by the second and third mortgages. Pending these actions the sureties brought a bill in equity against the bank, alleging that the value of the mortgaged property taken by the bank was enough to pay all the indebtedness of the company to the bank, or would have been if properly cared for and managed by the bank after possession taken, and praying for an accounting by the bank and for an injunction against the suits on the notes. All the suits, including that in equity, were reported to the law court for decision upon the pleadings and evidence.

There was no redemption of the mortgaged property and the title of the bank to all the tangible property subject to any of the mortgages became absolute through completed foreclosure at least as early as November 3, 1909. The main question, therefore, is how much credit for the mortgaged property the bank must allow upon the indebtedness to it of the company secured by the mortgages, or, more immediately, what credit therefor must be allowed on the nine notes in suit signed by the individual sureties. The amount of such credit, however, will be affected by the solution of several subsidiary questions which are now to be considered.

(2) 1. At the time the bank took possession of the mortgaged property, the company had on hand a large amount of unmanufactured stock and also had contracts for the manufacture and shipment of wood novelties, etc. The sureties claim that these contracts or some of them were profitable for the company and were such as the bank

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should have completed, but did not, and hence the bank should be debited with the profit it would have thus made. They also claim that by taking possession of the property, shutting down the mills, etc., the bank caused great depreciation in the value of the property, and that it should be debited with this depreciation.

Without considering other answers to these claims, it is a sufficient answer that the bank, even as mortgagee in possession, was under no legal obligation to carry on the business of the mortgagor. Granting that by taking possession of the mortgaged property the bank stopped a going concern, prevented the company and the sureties from fulfilling profitable contracts, and generally reduced the market value of the plant, it nevertheless was within its rights as mortgagee. It had given it the right to take the mortgaged property into its own possession upon the failure of the company and the sureties to comply with the conditions of the mortgages, but it did not have imposed upon it the duty of assuming the burden and risk of carrying on the business for their benefit. If it became trustee, it was for conservation, not for operation. The company and the sureties could have prevented such taking possession and all the consequences complained of by paying the indebtedness secured by the mortgages. To their failure to do so must be attributed the loss sustained.

There is no evidence that the mills, machinery, etc., could have been leased, and hence we do not find that the bank should be debited anything for rents and profits.

(3) 2. When the bank took possession of the mortgaged property, it also took possession of the books of the company containing their accounts for merchandise sold, etc. Some of these accounts the bank collected in whole or in part, but did not collect them all, nor did it put any of the uncollected accounts in suit or use other means to enforce payment except by solicitation, etc. What accounts it did not collect it turned over with the books to the trustee in bankruptcy upon his appointment in September following. The sureties now claim that the bank must be debited with the value of those accounts whether collected or not, such value to be fixed by the court from the evidence, as in the case of tangible personal property.

The answer to this claim is that choses in action, such as book accounts, are not within the law governing chattel mortgages. That law applies only to goods and chattels capable of manual delivery. Emmons v. Bradley, 56 Me. 333; Emerson v. E. & N. A. Ry., 67 Me. 387, 24 Am. Rep. 39; Marsh v. Woodbury, 1 Metc. (Mass.) 436; McKie v. Gregory, 175 Mass. 505, 56 N. E. 720. The inclusion of book accounts in a mortgage of goods and chattels simply operates as a pledge or an equitable assignment of them. The mortgagee does not acquire absolute title to them by a statutory foreclosure of the mortgage as a chattel mortgage. To acquire such title, he must have them sold as a pledge or under equity proceedings. It follows that the mortgagee is not obliged to give credit for their value upon completion of foreclosure of the chattel mortgage, but only for what he collects of them. Emmons v. Bradley, 56 Me. 333; McKie v. Gregory, 175 Mass. 505, 56 N. E. 720. He may proceed with the collection until the indebtedness secured by the assignment is fully paid, but, when that is paid, the remaining accounts belong to the assignor, as also

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do any proceeds of collection in excess of the indebtedness. There is no forfeiture as in the case of tangible property under a foreclosed chattel mortgage.

Of course, the assignee must not release any of the debtors in such accounts, nor impair any security given for them, but by simply accepting the assignment he does not assume the duty to collect, nor the obligation to incur the expense of suits, and the risk of insolvency of the debtors, of counterclaims, of uncredited payments, of claims for recoupment, etc. The assignor or his sureties can resume the right to collect on their own account at any time, at least before sale, by paying the indebtedness to secure which the assignment was made.

(4) 3. At the time of the bank's taking possession of the mortgaged property, the company had a stumpage permit on timber lands, to preserve which it was obliged to take off a fixed amount of stumpage each year, and make payments at fixed dates. The written permit was in the custody of the bank, but the bank did nothing toward complying with the conditions necessary to prevent forfeiture, whereupon the landowner canceled it. The sureties claim that this permit was a very valuable asset of the company which the bank should have preserved, and, not having done so, is bound to give credit for its value.

It is quite questionable whether the permit was included in any of the mortgages, but, at any rate, there was no provision in any of them that the bank was to assume the performance of its conditions. In the absence of such a provision, a mortgagee or pledgee is not bound to pay off any liens, or prior incumbrances, or perform any conditions necessary to perfect title or save from forfeiture. He may do so for his own protection, and have credit for what is necessarily paid for such purpose, but he may decline to do so, and let the property be taken under the superior title. Here, again, the company or the sureties could have preserved this and all the other assets of the company by paying the indebtedness for which they were mortgaged or pledged. Not having done so, they cannot now have credit for it.

4. It is not questioned that the first group of notes, the five dated February 1, 1905, and secured by the first mortgage, are to be paid in full out of the mortgaged property, before anything can be credited on the second group (the nine notes signed by the sureties), since these latter notes are of later date and the mortgage to secure them was expressly made subject to the mortgage securing the first group. A question is raised, however, as to whether any surplus after paying the first group in full is to be applied to the next indebtedness in order of date, viz., the nine notes signed by the sureties, or may be applied by the bank to the still later notes secured by the last mortgage but not signed by the sureties, leaving for the nine notes only the balance, if any.

(5) 2. The rule that a debtor in making payments may designate to what debts they shall be credited only applies to voluntary payments. Further in this case the company, the principal debtor and mortgagor, gave no direction as to how the value of the mortgaged property, or its proceeds should be applied, even supposing it could do so. The bank, therefore, as between itself and the company, could elect to apply the surplus, if any, to the mortgage indebtedness of a later date than that for which the sureties were liable. (6) It did so elect by

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bringing suit on the notes, signed by the sureties, and none on any other indebtedness secured by the mortgages. Starrett v. Barber, 20 Me. 457; Berry v. Pullen, 69 Me. 101, 31 Am. Rep. 248; Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335.

(7) The sureties certainly had no greater rights than their principal as to the application of the mortgaged property and proceeds. A surety has the same right as the principal to pay before foreclosure completed all the indebtedness secured by the mortgages, and thereupon he has the right to have delivered to him, instead of the principal, the mortgaged property and its proceeds to the extent of the amount thus paid. But "such previous payment by the surety is alike essential where there is only one debt and one surety, and where there are many debts, all of which are equally protected and secured by the property mortgaged, and many several sureties for the several debts; for the chief and primary object of a pledge or mortgage to a creditor is his benefit, protection, and advantage in reference to each and all of the several debts which it was made or given to secure. And, until this object is fully accomplished, no surety can justly or lawfully interfere to disturb him in the possession of the property pledged, or hinder him from appropriating the proceeds of it toward payment of any such debt which he cannot otherwise collect or render available. And if there be one or more debts thus secured for which the debtor is alone responsible, and the amount of which cannot be obtained from him on account of his insolvency or pecuniary inability, such proceeds may be applied, so far as necessary for that purpose, to the payment and discharge of such debts, and to that extent the sureties upon notes constituting other debts can have no interest or right in the mortgaged property." Wilcox v. Fairhaven Bank, 7 Allen (Mass.) 270, at page 272. (8) In considering the claim of a surety to have the proceeds of mortgaged property applied pro rata to the debt for which he was surety, the Supreme Court of Connecticut said: "What are his (the surety's) peculiar equities that he should claim to direct the application of payments made and received by other parties? The creditor and debtor had the sole right of controlling those payments; and, if neither have done this, the court must do it as the rights, equities, and intentions of the parties seem to demand. The defendant is an indorser, or, at most, a surety; and this constitutes his only relationship to those debts. It has been said that sureties are to be favored in the construction and enforcement of contracts. But we cannot extend such considerations to cases like the present. To do this would be to defeat the object and end of suretyship. It would be to hold that the surety might have the money paid by his principal so applied as to leave the creditor a loser notwithstanding his care and vigilance. This would be inequitable; and we cannot direct the application of this money upon this principle. Indeed, this is a case in which, if the creditor had made no application of the payment, the court, upon equitable principles, would apply it upon the precarious debts." Stamford Bank v. Benedict, 15 Conn. 437, at page 445.

In accordance with the principles above stated, the sureties can have applied to the notes signed by them only the surplus, if any, after the payment of all the other indebtedness of the company covered by the mortgages.

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5. The statutory 60 days' time for redemption from the foreclosure began to run May 15, 1909, but, before its expiration, the company, having been put into bankruptcy, the bank, through its attorney, without the consent of, or consultation with, the sureties, orally agreed, first, with the receiver, and then with the trustee in bankruptcy, of the company, to extend the time for redemption to November 3, 1909. There was no consideration for this extension, but it was granted at the request of the receiver and trustee to give them time to examine the property to determine whether there was a value in the equity of redemption. They did not redeem, however.

The sureties now claim that the amount of the mortgage indebtedness and the valuation of the property to be applied to it should be as of the expiration of the first 60 days, while the bank claims they should be as November 3d, following, a difference of some 120 days.

We think the principles last above stated, as to the rights of sureties, are applicable to this claim made by them. The bank was under no obligation to the sureties to begin suits against the company on the notes, or to press the suits to judgment at the return term, if begun. Eaton v. Waite, 66 Me. 221; Berry v. Pullen, 69 Me. 101, 31 Am. Rep. 248; Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335. By parity of reasoning, the bank was under no obligation to the sureties to begin foreclosure of its mortgages immediately upon default, or, if begun, to refuse more than the statutory time for redemption. If the interest was accumulating and the property deteriorating, the sureties had their preventive remedy. They could have paid the mortgage debts, and so have saved interest and loss. Without doing so, they cannot be heard to complain that the bank did not promptly and rigorously enforce its rights against the principal and the property. It is not a case of a variation of the contract which the sureties had guaranteed. There was no binding agreement for a consideration for an extension of the time of payment of the indebtedness. The bank could still have prosecuted the suits on the notes to judgment, execution, and levy. There was only a voluntary waiver of forfeiture for a limited time. No rights of the sureties were impaired thereby. Their loss, if any, was the result of their own delay in enforcing their own rights of payment and subrogation.

(1) 6. The sureties complain that the bank took possession of the mortgaged property abruptly without giving any notice of its intention to do so, and thereby abruptly stopped a going concern, subjecting it to a loss it would not have sustained had notice been given that possession would be taken if payment was not made. Since there was nothing in the mortgages, and no evidence of any agreement, to the contrary, the bank was under no legal obligation to give any notice of an intention to take possession, whatever loss it might thereby cause the company or its sureties. Here, again, the sureties have no legal cause for complaint. As in the other cases, they could have paid the mortgage indebtedness and prevented the loss.

7. It remains to ascertain the amount of the various mortgage notes and other mortgage indebtedness on November 3, 1909, when the bank's title to the mortgaged property became absolute; to ascertain what the bank had received for mortgaged property sold before that date; to ascertain the fair market value at that date of the mort-

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gaged property then remaining unsold; to ascertain the amount collected by the bank from the book accounts and other assets of the company; to ascertain the value of such mortgaged property, if any, as was lost through the bank's fault after taking possession and before forfeiture; to ascertain what amount should be credited the bank for care of the property during that time, watchmen, insurance, etc., and for sums necessarily paid to remove prior liens and encumbrances; to compute interest allowance either way; to ascertain what balance, if any, is applicable, as of November 3, 1909, to the notes in suit signed by the sureties after payment of all the other indebtedness secured by the mortgages; and to ascertain how that balance should be distributed for the relief of the several sureties.

(9) The parties introduced much and conflicting evidence upon these various questions, and now ask the law court to answer them. We must decline the task. The law court was not established to act as auditor, master in chancery, or accountant. While the law court may properly be called upon to review the work of such officers as to any disputed items, it cannot be required to take their place. As constituted, the law court cannot do such work efficiently or satisfactorily. The cases are therefore remitted to the court at nisi prius for the appointment of one or more suitable persons as auditors and masters to perform the work above indicated in accordance with this opinion, and such other work as may be necessary to furnish data for the determination of the issues between the parties and make return of their findings to the court.

So ordered.

Decision No. 1406.

McGREGOR ET AL. v. METROPOLITAN LIFE INS. CO.

(Court of Appeals of Kentucky. May 4, 1911.)

136 S. W. 889.

EVIDENCE — CONTRACTS — INSURANCE.

Where an insurance application provided that the company shall incur no liability until it has been approved, the policy delivered, and the premium actually paid and accepted by the company while the proposed is in good health, and the applicant was not deceived, and no fraud was practiced upon her, parol evidence of other statements made by the agent who secured the application are inadmissible to vary the application.

One who signs a written contract, refusing to read it, cannot say that he did not know its contents.

A condition in an application for an insurance policy that the company shall incur no liability under this application until it has been approved, the policy delivered, and the premium accepted by the company while the proposed is in good health, was not waived by the action of an agent who refused to deliver a policy to an applicant while sick in bed, but said he would deliver it on recovery, though he retained a certain small payment until the death of the applicant, which was in less than three weeks, for the company had a reasonable time in which to see whether the applicant was going to die.

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Appeal from Circuit Court, Caldwell county.

Action by Loton McGregor and another against the Metropolitan Life Insurance Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Hodge & Hodge, for appellants. John C. Gates, for appellee.

LASSING, J. On January 16, 1909, Nancy Maxwell McGregor made a written application to the Metropolitan Life Insurance Company, through its local agent at Princeton, Ky., for a policy of insurance upon her life for $2,000. In the application her father and mother were named as the beneficiaries. When she signed the application she paid to the agent $3 on account of the first premium, and the agent issued to her a written and printed receipt therefor. This receipt provided that: "No insurance is in force upon the application unless and until a policy be issued thereon and delivered in accordance with its terms." Among other provisions of the application was the following: "The company shall incur no liability under this application until it has been received, approved, and the policy issued and delivered and the premium has actually been paid to and accepted by the company during the lifetime of the life proposed and while he is in good health." Following the application, a medical examination was submitted to by the applicant before the local medical examiner at Princeton, Ky., and his report, together with the application, was forwarded to the home office of the company in New York, where it was approved, and on January 27, 1909, a policy of insurance was issued and forwarded to the local agent at Princeton, Ky., for delivery to the applicant. After the application for insurance had been made and the medical examination had, but before the policy had been returned from the New York office to the agent at Princeton, the applicant became sick and was confined to her bed at the time the policy was received by the agent. Upon learning these facts he declined to deliver the policy. The applicant grew worse, and died on February 16th following. The policy of insurance was never delivered to her, but returned to the home office in New York. After the receipt of the policy by the local agent, Loton McGregor, the father of the applicant and one of the beneficiaries specified in the application, learned that the policy was in the hands of the agent and tendered the balance of the semi-annual premium, amounting to something over $12, and demanded the policy. The agent explained to him that, under the terms of the application and policy, he had no right to deliver it to him because his daughter was sick, and, at the time he made the refusal, he stated that as soon as she got up — that is, well — he would deliver it. After the death of the applicant the balance of the premium was again tendered and the policy demanded. Following this refusal on the part of the company, suit was instituted to compel the company to deliver or surrender to the beneficiaries the policy and to pay the $1,000, less the balance of the semi-annual premium remaining unpaid.

The petition alleges that the agent through whom the application was made agreed that the policy of insurance, if one should issue, should be binding upon appellee and in full force and effect from the

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date of the acceptance of the application and the issual of the policy. The company answered and traversed this among the other material allegations of the petition, and pleaded affirmatively the clause in the application and receipt above referred to, and stated that at the time the policy was received by the local agent the applicant was sick; that for this reason and no other the policy was not delivered to her; that she continued to remain sick from the date of the receipt of the policy by the local agent until her death on February 16th. In the reply the plaintiff traversed the affirmative matter in the answer, and pleaded that the company did not rely upon the portions of the application set out in its answer, that it was printed in an obscure place in the application and was not read to the applicant at the time the other portions were read to her, and that it was not considered by either party. They further pleaded that the receipt was not read prior to the execution of the application; also, that the company, by the retention of the $3 advance payment on the semi-annual premium, waived its right tc rely upon the clause in the application requiring that the policy be delivered to the applicant in good health before it became operative. The affirmative matter in the reply was traversed in the rejoinder, thus completing the issues, which, when analyzed, are two: First, did the applicant become sick after the date of the application for insurance which she signed? and, second, did the company waive its right to rely upon the clause in the application and receipt providing that the policy should not be binding unless delivered to the applicant while in good health?

Upon the trial of the csae Loton McGregor, father of the applicant and one of the beneficiaries, was introduced as a witness, and at the conclusion of his testimony the court peremptorily instructed the jury to find for the company, which was done.

In their motion and grounds for a new trial appellants assigned and relied upon four errors. First, that the court erred in rejecting competent evidence; second, that the court erred in refusing to grant a continuance of the case in order that plaintiff might file an amended petition, pleading a modification of the written application; third, that the court erred in refusing to consider an amendment as offered to be filed; and, fourth, that the court erred in peremptorily instructing the jury to find for the defendant. The motion for a new trial was overruled and judgment entered upon the verdict. Plaintiffs appeal, and for reversal rely upon the grounds set out in the motion for a new trial.

(1) The evidence which the court rejected, of which appellants complain, is that offered to show that, at the time the application was made and the $3 paid on the first semi-annual premium, the agent of the company represented to the applicant that the policy would become binding upon the acceptance of the application of the issual of the policy. The court rejected this testimony for the evident reason that he was of opinion that the application, in the absence of a charge that it was procured through fraud or mistake, represented the real contract. The witness testifies that in his presence in their home the agent and his daughter, the applicant, discussed the proposition of her taking insurance and the kind she wanted, and after they had agreed the application was drawn up and signed by her and the $3

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paid and a receipt issued therefor. The first of these questions and answers is as follows: "Was anything said about when the policy would become of full force, and, if so, what was it?" The avowal is that: "The agent stated that, if she would pay $15.36, the amount of the semi-annual premium, he would give her a receipt binding from date; then the question was asked, if they paid the $3, when would the policy become in full force and effect, and the agent answered and said from the date of the issual of the policy." When the court refused to permit this question to be answered, plaintiffs offered to amend their pleadings, evidently with the end in view of making the line of interrogation which his counsel had entered upon competent. But the court refused to pass the case to give the counsel time to prepare the amendment. In this the court did not abuse his discretion. Both the application and the receipt in plain terms contradicted the avowal, and, as there is no allegation that the applicant was deceived or overreached or a fraud was practiced upon her, this evidence was clearly incompetent to alter, vary, or modify the terms of the contract as set out in the application. The applicant is shown to have been a school teacher — an educated woman.

(2) 1. In the pleadings it is alleged that she did not read the application or the receipt. This fact cannot be of benefit to her, for, being able to read, and an opportunity being offered to her to do so, she may not shelter behind the allegation that she failed to exercise this right. As was well said by this court in the case of J. I. Case Threshing Machine Co. v. Mattingly, 142 Ky. 582, 134 S. W. 1133: "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it or did not know what it contained. If this were permitted, contracts would not be worth the paper upon which they are written. But such is not the law. A contractor must stand by the words of his contract; and if he will not read what he signs, he alone is responsible for his omission." The applicant then being charged with the knowledge of what the contract which she signed contained, the court did not err in refusing to permit evidence, under the circumstances, to show a different contract from that expressed in the application. It is well settled that written instruments cannot be altered or modified by any verbal statements or representations of either party in the absence of fraud or mistake in their execution, and the failure to read does not constitute a mistake within the meaning of the word as here used.

In the case of Provident Savings Life Assur. Society v. Elliott, 93 S. W. 659, 29 Ky. Law Rep. 552, this court, in discussing the effect to be given a writing into which two contracting parties have entered, quoted with approval from the case of Fowler v. Preferred Accident Co., 100 Ga. 300, 28 S. E. 398, the following: "All oral agreements and negotiations between the plaintiff and the defendant's agents, in reference to accident insurance which the plaintiff desired to procure in the defendant company, resulted in the plaintiff filling out and signing an application for a policy for such insurance in the defendant company, and the agent of the defendant giving the plaintiff a receipt for a certain sum on the first quarterly premium of the policy to be issued by the defendant, and were, therefore, merged in the said writ-

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ten instruments by virtue of the plain and familiar rule that all oral negotiations and conversations and agreements between the parties which either precede or accompany the execution of the instrument, are to be regarded as merged in or extinguished by it, and the writing is to be treated as the exclusive agreement by which the parties are bound. Therefore, whatever conclusions were reached, or stipulations agreed upon, by plaintiff and defendant's agents in the oral negotiations and conversations between them in reference to the insurance must be considered as embraced in the written application and receipt."

In the case of Vansant v. Runyon, 44 S. W. 949, 19 Ky. Law Rep. 1981, in disposing of a similar question, this court quoted with approval from 1 Greenleaf on Evidence, § 275, the following: "All oral testimony of a previous colloquium between the parties, or of a conversation or declaration at the time it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

And in Hill's Adm'r v. Penn. Mutual Life Ins. Co., 90 S. W. 544, 28 Ky. Law Rep. 790, where the contention was that the contract of insurance became operative from the time of the signing of the application, this court said: "The written application distinctly shows that there was to be no insurance and that the company should incur no liability until the application had been accepted and the policy issued and delivered during the lifetime of the insured and while he was in good health."

This disposition of the first error complained of obviates the necessity of passing upon the second and third, for the reason that, if the testimony offered was not competent, it would not in any wise have aided plaintiff's case to have permitted the desired amendment to be filed.

(3) The only remaining question is: Did the company waive that provision of the application providing that the policy should be delivered to the applicant while in good health before it became a binding contract, by retaining the $3, part payment on the first semi-annual premium after the agent of the company learned that the applicant was sick? The witness Loton McGregor testified that the agent told him that his only reason for refusing to deliver the policy was that his daughter was sick, that he had seen the doctor, and he said he thought she would be up in a few days, and he would then deliver it. This is the substance of his testimony, and this explains why the $3 was retained by the agent. It was done in the hope that applicant would recover her health so as to enable her to receive the policy. The receipt provided that, if the policy was not issued and delivered, the $3 should be refunded and returned to the applicant. The policy was received by the agent on January 27th. The applicant died on February 16th. Thus, less than three weeks elapsed between the date of its receipt and her death. The retention of the money by the agent for this length of time did not, under the circumstances, operate as a waiver of that provision of the application set up and relied upon by the company. The best evidence that the company did not so regard it is found in the fact that its agent was at that time refusing to de-

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liver the policy for the very reason that the clause in the application under consideration prohibited him from doing so.

A similar question was before this court in the case of Commonwealth Life Ins. Co. v. Davis, 136 Ky. 339, 124 S. W. 345. There the applicant, at the time of making the application, had paid to the agent 60 cents; this being one weekly installment on the policy. The company issued the following receipt therefor: "Received from Mrs. Davis 60 cents, being a deposit on account of application for insurance in the Commonwealth Life Insurance Company made this date, which said deposit is to be paid by me to the company if the application be accepted, and returned to the applicant if the application be rejected. No obligation is incurred by said company by reason of this deposit, unless and until a policy is issued upon said application, and unless at the date and delivery of said policy the life proposed is alive and in sound health." This application was dated January 30, 1907. The policy was not delivered on March 11, 1907. The applicant took pneumonia, and on the 17th died. Between the date of the application and the death of the applicant the policy was issued and sent to the local agent, but not delivered. Demand was made therefor, and upon refusal suit was instituted, as in this case. In denying a right to recover, this court said: "It being admitted that the policy was not issued while the insured was in sound health, or delivered to him at all, the case narrows down to the single question whether or not the receipt of the first premium, the acceptance of the application, and the issual of a policy completed an enforceable contract between the parties not withstanding the conditions of the receipt and application. . . . It is manifest that a valid contract of insurance was not made, as one of the conditions upon which the company agreed to issue and deliver the policy was that the insured should be in sound health at the date of its issual and at the time of its delivery. The company had the right to annex this condition to the application, and, although it may have accepted the application in ignorance of the condition of health of the insured, it had the right, according to the plain language of the application, to decline to issue the policy or to decline to deliver it if before issual or delivery it ascertained that the insured was not in sound health." To the same effect are Clark v. Mutual Life Ins. Co., 129 Ga. 571, 59 S. E. 283, and Kilcullen v. Metropolitan Life Ins. Co., 108 Mo. App. 61, 82 S. W. 966.

The contract, as set out in the application and receipt, being a binding, valid, and enforceable contract, and the company not having waived the provisions thereof by retaining the $3 on the first semi-annual premium a reasonable time, and until it could be ascertained whether or not the applicant was going to recover, there was nothing for the court to submit to the jury, and the peremptory instruction was proper.

Judgment affirmed.

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Decision No. 1407.

BAIRD v. ERIE R. CO. ET AL.

(Supreme Court, Equity Term, Erie County. May, 1911.)

29 N. Y. Sup. 329.

REFORMATION OF INSTRUMENTS — CONTRACTS — COVENANTS — RAILROADS — RIGHT OF WAY — EASEMENTS — JUDGMENT — ELECTION OF REMEDIES — EQUITY — "LACHES."

A plaintiff suing to reform a contract must establish his case by clear and convincing evidence.

In a suit to reform a contract for special switching rates for furnaces on a tract of land, evidence held to show that all the parties understood that the switching rates should apply to two furnaces, by whomsoever operated, justifying the reformation of the contract to that extent.

Where an owner granted a right of way to a railroad company on the understanding that it should grant switching privileges, a switching contract between the owner's tenant and the company, supported by a consideration furnished by the owner, was for his benefit, and, though he was not a party to the contract, he was entitled to the benefit thereof, and his assignee could sue to reform the contract; the conveyance of the right of way and the switching contract constituting but one instrument.

All papers constituting or intended to constitute a written agreement must be read together as one.

Where an owner of land granted a right of way to a railroad company pursuant to the understanding that the railroad company would switch cars from furnaces located on the land, a separate switching contract between the owner's lessee and the company was for the benefit of the owner within the rule that a contract may be enforced by one for whose benefit it was made.

Where an owner granted to a railroad company a right of way pursuant to an understanding that the company would switch cars from blast furnaces located on the land, a switching contract between the company and the owner's lessee was supported by a consideration paid by the owner, who had direct rights under it, entitled to enforce it.

Where a contract between a railroad company, obtaining a right of way from the owner of land, and the owner and his lessee, stipulated for switching rates from two furnaces located on the owner's land, the covenant in the contract ran with the land, and a subsequent lessee of the land and his assignee was entitled to the benefits thereof.

A railroad company accepting a right of way grant must perform the conditions annexed to the grant constituting its consideration, though it has not signed the grant.

Where a tenant of a part of the landlord's land has trackage rights and terminal storage privileges on the remainder, the tenant, occupying the remainder, has sufficient interest therein to procure for the entire land a covenant with the railroad company running with the land, inuring to the benefit of the landlord and his future tenants.

A tenant of premises occupied by it may secure a permanent easement for his own benefit and for the benefit of the landlord over adjacent lands, in which neither had any interest, which easement will, on the termination of the tenancy, inure to the benefit of the landlord as a covenant running with the land.

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The bringing of an action at law on a contract which results in a nonsuit or discontinuance or anything short of a determination on the merits does not bar a subsequent action to reform the contract and for relief on the reformed contract.

A party bound by electing his remedy must at the time of making the election have knowledge of the facts from which the inconsistent rights arise, and, to constitute a conclusive election as to the legal effect of an instrument, the party chargeable therewith must at the time he brings an action at law thereon have full knowledge of the legal effect to deprive him of the right to maintain a subsequent action to reform the instrument on the ground of mutual mistake as to its legal effect.

The doctrine of laches as a defense to a suit in equity implies something more than a mere lapse of time; and, to constitute a defense, it must be unreasonable.

A suit in equity to reform an instrument may be brought at any time within the statutory limit of 10 years, unless a delay results in prejudice to the adverse party or there is such a change of situation as will make it inequitable to grant relief.

A suit to reform a contract executed in 1896 brought nearly 10 years thereafter is not barred by laches, the rights claimed by plaintiff under the contract as reformed not having been denied until 1899 and 1900, and an action at law having been begun in 1901 and the suit in equity having been speedily instituted after the action at law had terminated adversely to plaintiff.

Action by Frank B. Baird against the Erie Railroad Company and others to reform a contract. Judgment for plaintiff.

Bissell & Riley, George C. Riley, Simon Fleischmann, and Robert F. Schelling, for plaintiff and defendants Union Iron Co. of Buffalo and Buffalo Union Furnace Co. Moot, Sprague, Brownell & Marcy, Adelbert Moot, and Helen Z. M. Rodgers, for defendant Erie R. Co.

MARCUS, J. This action is brought by plaintiff as assignee of the rights and claims of the Union Iron Company of Buffalo and of the Union Iron Works, Buffalo, N. Y., to secure the reformation of an instrument, dated February 24, 1896, granting certain switching rates, and wherein the defendant the Erie Railroad Company is named as party of the first part, and the Buffalo Furnace Company party of the second part, and for the recovery of switching charges in excess of those stipulated, paid, under protest, to the railroad company. Plaintiff asks that the clause in the second paragraph and near the beginning of said agreement, whereby the switching rates given are limited to two "furnaces operated by the party of the second part," shall be amplified so as to apply to furnaces when operated by parties other than the Buffalo Furnace Company, the party of the second part, and thus accord with the last clause inserted at the end of said contract, just before its execution, which provided that "if the said furnaces, or either of them, shall be operated by other parties than the Buffalo Furnace Company, said parties so operating shall have the benefit of the switching rates named herein during the term of this contract."

The ground upon which plaintiff seeks such reformation is that the first of the above clauses was left in said contract after the new clause was added, under a misapprehension by all of the parties thereto, as to the legal effect of the two when read together; it being mutually understood that the newly inserted clause was intended to give the

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switching rates to two furnaces, if operated by parties other than the Buffalo Furnace Company, as well as when operated by that company, and that plaintiff and his predecessors in interest did not learn of, and were not chargeable with knowledge of, the legal effect of such contract, as it was allowed to stand, with both clauses left in, until the courts, in an action at law, brought upon the contract as it was, to recover excessive freight charges, determined that the switching rates under the contract, as it stood, were available only to furnaces operated by the Buffalo Furnace Company, or its technical successors, or assignees. In the action at law, a nonsuit was granted, which was affirmed on appeal by the Appellate Division. Thompson v. Erie R. R. Co., 96 App. Div. 539, 89 N. Y. Supp. 92.

(1) In entering upon the consideration of this case, the court has in mind the proper and well-established rule that, to enable a plaintiff to succeed in an action for reformation, his proof must amount to more than a bare preponderance of evidence, which leaves the issue in doubt; that it must be clear, unequivocal, satisfactory, and convincing. Southard v. Curley, 134 N. Y. 155, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642; Nevius v. Dunlap, 33 N. Y. 676.

(2) A brief survey of the facts disclosed upon the present trial is necessary to afford a proper basis for a consideration of the legal effect of the evidence and its force. As there is a great similarity in the names of various parties involved, it is necessary to keep the particular title of the different companies constantly in mind.

The defendant the Union Iron Company of Buffalo has during all the times embraced in the present litigation been the owner of a large tract of land of about 52 acres in the southeasterly portion of Buffalo, and its entire tract has been known for many years as "Union Iron Works;" more or less of the premises having from time to time been occupied by blast furnaces. These lands were bounded on the north by two main freight tracks of the New York, Lake Erie & Western Railroad Company, which was afterwards reorganized into the defendant the Erie Railroad Company. Immediately south of these lands was a large tract owned by the railroad company itself, known as Farmer's Point. Mr. Baird, the plaintiff, became interested in the Union Iron Works property prior to 1892, being connected as an officer and stockholder with the companies operating blast furnaces thereon, and in 1892 obtained a ten-year lease of a little less than the southerly half thereof, upon which he completed a blast furnace, thereafter known as "Furnace A." Later on in the same year Mr. Baird organized the Buffalo Furnace Company, one of the parties to the agreement in controversy, and assigned to it his lease. Under this lease the lessee had certain rights to use and lay tracks through, and to store material upon, the remainder of the Buffalo Furnace Company's entire tract of land, lying north of and between its lands and the railroad company's tracks, and practically was in possession of the entire tract until 1896. In the latter part of 1892, negotiations were had between Mr. Baird and Mr. Brunn, the superintendent of the Western Division of the New York, Lake Erie & Western Railroad Company, looking to the acquirement by the railroad company of a double-track right of way southerly from its freight tracks and through the entire tract of land of the Union Iron Company of Buf-

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falo to the lands owned by the railroad company and known as Farmer's Point, lying southerly of the said lands of the Union Iron Company of Buffalo, in exchange for favorable switching rates to be granted by the railroad company. In the course of these early negotiations, and in January, 1893, a draft of a proposed written agreement was drawn up between the railroad company and the Buffalo Furnace Company, providing for switching rates from the works of said Buffalo Furnace Company to various railroads, which, however, was not accepted by either party, nor ever executed. Mr. Baird had no recollection of this agreement when questioned in regard thereto upon the trial, but it is undisputed that the parties came to no agreement at the time, and that negotiations in regard to the matter were dropped and abandoned on both sides for about two years, and not resumed until 1894 or 1895. Mr. Baird then took up the question anew with Mr. Eben B. Thomas, who was successively first vice-president and president of the railroad company, was appointed one of its receivers in April, 1895, and became the president of the reorganized Erie Railroad Company, the defendant herein, November 14, 1895.

Mr. Baird testified that Mr. Thomas visited the property in question with him, and that they saw Furnace A of the Buffalo Furnace Company, and that he pointed out to Mr. Thomas where he proposed to erect a second furnace, thereafter known as "Furnace B," upon the northerly portion of the lands of the Union Iron Company of Buffalo. Mr. Baird states that he entered upon negotiations with Mr. Thomas which finally resulted in an oral agreement made in September, 1895, between the Union Iron Company of Buffalo, the Buffalo Furnace Company, and the railroad company and its receivers, whereby it was agreed that the Union Iron Company of Buffalo, with the consent of the tenant, the Buffalo Furnace Company, should convey to the rail road company a double-track right of way from the railroad company's main tracks, through the lands of the Union Iron Company of Buffalo, to the railroad company's lands south thereof, and that, in consideration thereof, the railroad company should, for 15 years, switch cars to and from two blast furnaces located, or to be located, upon the entire tract of land owned by the Union Iron Company of Buffalo, by whomsoever operated, at certain stipulated rates as to different trunk lines in Buffalo to which such switching should be done. Mr. Baird testifies definitely and clearly as to the elements of this oral contract, which was to be reduced to writing, and Mr. Thomas does not squarely deny the arrangement as detailed by Mr. Baird, but says that it is impossible for him at this distance of time to recall individual conversations. Mr. Thomas, however, states that, after refreshing his memory from the correspondence and papers, his recollection is that there was at the time this arrangement was made one furnace, and that Mr. Baird intended to build another, and he sums up the matter in the following words:

"We were willing to make a switching contract to the Buffalo Furnace and to another one to be built there, but to extend that indefinitely would be to extend that to a cost which we could not estimate, and possibly far beyond its value."

This refusal to extend the switching privileges indefinitely doubtless was in answer to Mr. Baird's original request for rates for three furnaces.

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The plaintiff claims that subsequent acts of the railroad company and its receivers and the conduct of all parties concerned, which are entirely or substantially undisputed, corroborate his testimony as to the agreement made between Mr. Thomas on behalf of the railroad company and its receivers and himself as the representative of the Union Iron Company of Buffalo and the Buffalo Furnace Company, and, after careful consideration, the court is led to the conclusion that he sustains his position with convincing force.

Mr. Baird testifies that within a few days after making the oral agreement with Mr. Thomas the railroad company prepared and submitted to him a proposed written agreement embodying in a single instrument the grant of the right of way by the Union Iron Company of Buffalo over its lands to the railroad company, and the covenant on the part of the railroad company to give the stipulated switching rates; but, as this proposed contract omitted the names of two of the railroads to which switching was to be done, Mr. Baird returned it for correction in this respect. Mr. Baird further testifies that shortly thereafter he met Mr. Thomas at his office in New York city, and that Mr. Thomas said that he would have to change the form of the contract in a manner that would not make any difference to any of the parties, but that he desired it put into two separate instruments, one granting the right of way to be recorded, and the other containing the switching part of the agreement to be kept unrecorded, as he did not wish to place on record and thereby give publicity to the switching rates.

Mr. Thomas denies that he objected to making the switching rates a matter of public record, but Mr. Baird's version of this phase of the matter seems reasonable, and is corroborated by other circumstances which tend to show that Mr. Thomas's recollection on this point is faulty. However, this detail is not of particular importance, as it is undisputed that the right of way grant and the switching agreement were, by consent, to be separated and reduced to writing in separate instruments, and there is no substantial dispute as to the development and sequence of the various papers thereafter drawn, or that they were all prepared in the first instance by the railroad company and its representatives. The next step in reducing to writing the oral agreement that had been made is found in the separate instrument, dated October 4, 1895, and acknowledged on various dates thereafter, the last acknowledgment being dated November 4, 1895, whereby the Union Iron Company of Buffalo, with the consent of the Buffalo Furnace Company, granted the right of way to the New York, Lake Erie & Western Railroad Company and its receivers and their successors and assigns. The parties named in this grant are the Union Iron Company of Buffalo, the Buffalo Furnace Company, the New York, Lake Erie & Western Railroad Company, and J. G. McCullough and Eben B. Thomas, as receivers of the said railroad company; and all of said parties formally executed and acknowledged the same. The consideration expressed is the nominal sum of $1 and the various preambles therein recited; but it is conceded by all parties that the large and substantial consideration for this grant was the favorable switching rates agreed to be given by the railroad company. Mr. Baird claims that this grant of right of way was left in November, 1895,

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with a representative of the railroad company in escrow, and that it was not to be deemed delivered until the railroad company delivered the switching agreement which it was to prepare. It appears, however, that the railroad company recorded this conveyance on January 17, 1896, some weeks before the switching agreement was delivered. This premature recording is not of moment at this time, as its delivery must be deemed to have been subsequently ratified by the parties thereto. After the original delivery of the right of way grant by Mr. Baird to the railroad company, Mr. Baird, as well as Hanna & Co., of Cleveland, who were interested in the Buffalo Furnace Company, promptly demanded of the railroad company, through Mr. Thomas, the written switching agreement which had been agreed upon, with the result that the railroad company prepared a draft between it and Mr. Baird personally, which was promptly rejected, as Mr. Baird was not personally a party to the agreement.

Thereupon a second draft of a proposed switching agreement was prepared by the railroad company, the parties to which were stated to be the reorganized Erie Railroad Company and the Union Iron Company of Buffalo, the owner of the entire tract of land involved, and which agreement was substantially correct, and provided that the stipulated switching rates should apply to two blast furnaces upon the lands of the Union Iron Company of Buffalo, and, further, that:

"The Buffalo Furnace Company or other parties leasing said premises from the Union Iron Company of Buffalo, shall be entitled to the benefits of the switching rates named herein during the life of this contract."

There was omitted, however, from this draft, probably through inadvertence, a provision that the switching rates should be operative from October 4, 1895, the date of the switching grant, and there were also omitted two of the railroads to which the switching rates should apply. This draft of the agreement, prepared by the railroad company itself, with the incidental corrections referred to, carried out the actual prior oral agreement of the parties, and would doubtless have been executed but for the intervention of Mr. Brunn and Mr. Merrill, as appears from the further testimony. That such a draft of the switching agreement should have been prepared by the railroad company itself, and should have run directly to the Union Iron Company of Buffalo, before Mr. Merrill's connection with the railroad company, and before Mr. Brunn intervened and suggested objections thereto, is extremely significant, as showing the understanding of Mr. Thomas, of the receivers, and of the railroad company as to the parties who were to have the benefit of the switching rates, viz., the Union Iron Company of Buffalo and its tenants and as corroborating Mr. Baird's evidence and contention that this was distinctly so understood from the outset. This draft of the switching contract was submitted to Mr. Baird for approval and execution, and was also sent to Mr. Brunn, at Buffalo, for his inspection. Mr. Brunn having in mind only the negotiations with Mr. Baird had three years before, in which a draft of a proposed agreement had been drawn up with the Buffalo Furnace Company alone and relating to its works alone, and who evidently had no knowledge of the new agreement, made three years thereafter directly with Mr. Thomas, wrote to the general superin-

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tendent of the railroad company in New York city on December 10, 1895, that there must be some mistake in drawing the contract with the Union Iron Company of Buffalo, the owner of the land, and stated that the switching contract was not to run to this company, but to the Buffalo Furnace Company; and he advised that the contract should not be made with the Union Iron Company of Buffalo, because it had some undeveloped property upon which it might in time conclude to erect furnaces, unless the company would consent to limit the switching rates to the business of the Buffalo Furnace Company.

It was at this juncture that the reorganized Erie Railroad Company, the defendant herein, began its active career at the beginning of the year 1896, with Mr. Thomas as president and Mr. William F. Merrill as one of its vice-presidents. Mr. Thomas turned over to Mr. Merrill the papers, including Mr. Brunn's letter, and the drafts of proposed contracts that had thus far been made, as well as the matter of closing up the switching part of the agreement. As Mr. Merrill did not enter the service of the railroad company until January 1, 1896, he had no personal knowledge of the terms of the agreement that had theretofore been made between the old railroad company and its receivers and the Union Iron Company of Buffalo and the Buffalo Furnace Company. The greater or less confusion incident to the reorganization of the railroad company at its very inception, and the lack of knowledge on the part of Mr. Merrill as to what had preceded, may, in some measure, account for the further delay and misunderstanding on his part which arose in connection with this switching agreement. Mr. Merrill, having before him Mr. Brunn's letter, and looking after the interests of the company with which he had just become identified, determined to act upon Mr. Brunn's advice, and he refused to execute the contract directly with the Union Iron Company of Buffalo, the owner of the land, which had been prepared, and stated to Mr. Baird that he would only make the switching agreement with the Buffalo Furnace Company; the company then operating the furnace upon the lands of the Union Iron Company of Buffalo. Mr. Baird strenuously and persistently refused to accept any switching contract, the terms of which should not be in compliance with the oral agreement theretofore made, and which should not inure to the benefit of two furnaces located, or to be located, anywhere upon the lands of the Union Iron Company of Buffalo and by whomsoever operated. Thereupon Mr. Merrill prepared various successive drafts of such switching contract, in form, between the Erie Railroad Company and the Buffalo Furnace Company, which contained various variations as to certain of the railroads included, the time when the switching rates should go into effect and as to other details, all of which, however, were corrected, upon the suggestion of Mr. Baird, so as to conform to, and embody, the terms of the original agreement which Mr. Baird claimed had been made with Mr. Thomas in regard thereto. The draft prepared by Mr. Merrill prior to the one of February 24, 1896, which was finally executed, was in the same language as this final one, with the exception of some immaterial words stricken out by Mr. Merrill and with the exception of the final clause added in pencil by Mr. Wilbur, the president of the Union Iron Company of Buffalo, and which became a part of the final draft of February 24,

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1896, as eventually executed. This draft, immediately preceding the final one executed, was drawn between the Erie Railroad Company and the Buffalo Furnace Company, and provided, in its second paragraph, near the beginning thereof, as had some of the prior drafts, that the railroad company would switch cars at the specified rates from "the furnaces operated by the party of the second part, located in the southerly part of the city of Buffalo, in the county of Erie and State of New York, commonly known as the Union Iron Works." The last clause at the end of this draft provided that the rights, obligations, and privileges thereby conferred should inure to the successors or assigns of the respective parties. The draft in this form was taken by Mr. Baird to Mr. Wilbur, at Bethlehem, Pa., where Mr. Wilbur resided, and Mr. Wilbur refused to accept the switching agreement in this form, upon the ground that it limited the switching privileges to two furnaces to be operated by the Buffalo Furnace Company, or its successors or assigns; whereas, the agreement that had been made with Mr. Thomas provided that the switching privileges should be for the benefit of two furnaces upon the lands of the Union Iron Company of Buffalo, by whomsoever operated, or, in other words, should be for the benefit of the Union Iron Company of Buffalo, the owner of the land and its assigns and tenants. Mr. Wilbur then wrote out a pencil clause, intended to carry out his contention as to the original contract, to the effect that, "if the said furnaces or either of them shall be operated by other parties than the Buffalo Furnace Company, said parties so operating shall have the benefit of the switching rates named herein during the term of this agreement," and insisted that such clause be added to the contract, if the railroad company desired to have the contract, in form, with the Buffalo Furnace Company.

Mr. Baird thereupon returned to New York, and reported to Mr. Merrill that Mr. Wilbur and he insisted upon the switching rates being for the benefit of two furnaces upon the Union Iron Works property by whomsoever operated, and stated that Mr. Wilbur had inserted a clause to cover that point, and that, if Mr. Merrill would not consent to add that clause, the deal was off. Mr. Baird testifies that Mr. Merrill replied that that was what he (Mr. Baird) had been asking for all the time and what he (Mr. Merrill) had thus far refused to give him, but that he would consent to it, and that he was thereby giving him what he had asked for, and that he hoped he was satisfied. Mr. Merrill not only does not deny this testimony of Mr. Baird's, but, when crowded by the railroad company's own counsel on the proposition as to whether he could go any further than not remembering the conversation, says: "It may have been — it may have been; but he got that clause."

So far as the important question of fact involved in this case is concerned, as to whether the railroad company and the Union Iron Company of Buffalo and the Buffalo Furnace Company all intended, supposed, and understood that the switching agreement executed by the railroad company and the Buffalo Furnace Company on February 24, 1896, gave the switching rates, therein provided, to two furnaces upon the lands of the Union Iron Company of Buffalo, by whomsoever operated, it seems to me that plaintiff has established this fact in his

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favor by clear and convincing evidence and by the inferences reasonably and necessarily to be drawn therefrom. Other undisputed facts and circumstances leading to this conclusion are not wanting. One of the early drafts of the proposed switching agreement prepared by the railroad company, as already pointed out, ran directly to the Union Iron Company of Buffalo, and provided that not only the Buffalo Furnace Company, but other parties leasing the premises from this company, should be entitled to the switching rates. We have here the construction put by the railroad company itself upon the oral agreement originally made, and it is precisely what Mr. Baird and Mr. Wilbur had at all times insisted upon, what Mr. Wilbur covered with the pencil clause finally inserted, and what Mr. Merrill was finally compelled again to yield, after seeking to modify it by intermediate drafts limiting the switching privileges to two furnaces to be operated by the Buffalo Furnace Company. Remembering that the clause in the early part of the contract limiting such switching rates to the Buffalo Furnace Company had been in various drafts, and that Mr. Wilbur's clause was thereafter added at the end of the contract, it is easy to perceive how the modification or striking out of the original limiting clause was overlooked. It is also of consequence to note that while various drafts prepared by Mr. Merrill contained other discrepancies at variance with the oral agreement, such as the omission of certain railroads and the failure to have the switching rates extend back to October 5, 1895, all of these inaccuracies were readily conceded and adjusted to conform to the oral agreement, as claimed by Mr. Baird, and, finally, the only remaining point, viz., the applicability of the rates to two furnaces by whomsoever operated, which, in itself, had been recognized and conceded in the early draft running directly to the Union Iron Company of Buffalo, was also again finally acquiesced in, and presumably provided for, in the instrument eventually executed. The difference between the parties is, indeed, in one sense, slight. While it appears that the early negotiations in 1892 between Mr. Brunn and Mr. Baird resulted in a proposed draft of contract relating only to one furnace of the Buffalo Furnace Company, it is conceded by all parties that under the arrangement subsequently made with Mr. Thomas the number of furnaces was increased to two, and the only point of contention between the parties that has arisen is whether the two must be operated by the Buffalo Furnace Company, or may be operated by the Union Iron Company of Buffalo, or its successors or tenants upon its lands.

As bearing upon the reasonable probability of the actual arrangement being as claimed by Mr. Baird, that the switching rates were to be available to two furnaces, by whomsoever operated, so long as they were located upon the lands of the Union Iron Company of Buffalo, it may be further noted that at the time the oral agreement was made the Buffalo Furnace Company had one furnace in operation, which occupied not only the southerly part of the lands of the Union Iron Company of Buffalo, particularly leased to it, but spread its operations practically over the remaining lands of the Union Iron Company of Buffalo, upon which it had certain trackage and storage privileges. Moreover, the lease from the Union Iron Company of Buffalo to the Buffalo Furnace Company, in existence at the time the

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oral agreement was made, was dated June 1, 1892, and was only for a period of 10 years; whereas, the switching privileges were to continue for 15 years from October 4, 1895, or over seven years after the leasing period terminated. This circumstance makes it, at least, improbable that the Union Iron Company of Buffalo would grant a right of way through its entire property and exact a switching privilege for 15 years for the sole purpose of having the same apply only to furnaces which, even if there had been room for two furnaces upon the limited piece of land definitely then under lease to the Buffalo Furnace Company, could only be used as matters then stood for less than eight out of fifteen years contracted for. Above all, there is the pencil clause itself inserted after everything else had been disposed of and reduced to typewriting, providing specifically that, "if the said furnaces, or either of them, shall be operated by other parties than the Buffalo Furnace Company, said parties so operating shall have the benefit of the switching rates named herein during the term of this agreement," and the circumstances under which this clause was insisted upon by Mr. Baird and Mr. Wilbur and finally acquiesced in by Mr. Merrill. In view of the refusal of Mr. Merrill, through several proposed drafts of the agreement, to insert this provision and his final consent thereto, it seems to me beyond reasonable dispute that the purpose of this clause was to make provision for the operation of the furnaces by parties other than the Buffalo Furnace Company, just as it states, and that all parties so intended and understood its purpose, and that none of them then appreciated or apprehended that it would, in the future, be construed as restricted by the clause in the earlier part of the contract, which was left undisturbed, limiting the switching rates to such furnaces as should be operated by the Buffalo Furnace Company or its technical successors or assigns. With the history of the development of the final draft of the switching agreement of February 24, 1896, as disclosed, for the first time upon the trial of this suit in equity, before the court, it is difficult to conceive that the clause added by Mr. Wilbur and consented to by the railroad company could have had any other intent or purpose than to make the contract grant precisely the privilege of the switching rates to two furnaces by whomsoever operated, or that it was not so understood by both parties, and that the failure to make the prior clause conflicting with this new clause conform to it, was not the result of a mutual mistake, inadvertence, and oversight. After the oral agreement had been made in the fall of 1895, Mr. Baird secured an extension of the existing lease of the Buffalo Furnace Company property for five years from June 1, 1902, the termination of the existing ten-year lease, and this extension lease is dated October 4, 1895, the date of the right of way granted from the Union Iron Company of Buffalo to the railroad company. This lease of October 4, 1895, was surrendered on May 13, 1898, and a nine-year lease from June 1, 1902, given in place thereof. It appears that Mr. Baird, at the time of negotiating the oral agreement with the railroad company for switching rates in 1895, had an agreement or understanding with the Union Iron Company of Buffalo for a lease to him of the northerly part of the property of the Union Iron Company of Buffalo, which fact was communicated to Mr. Thomas, and that in 1897 he actually began the

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construction of furnace B on that portion of the property, although he did not obtain a formal written lease thereof until May 13 1898, when a formal lease was executed for thirteen years from June 1, 1898, which expired a few months after the fifteen-year period of the switching agreement. All these leases, covering the premises occupied by furnaces A and B, were in July, 1899, assigned to a new corporation known as Union Iron Works, Buffalo, N. Y., with the consent of the Union Iron Company of Buffalo, and this new company operated furnace B during the period in which the railroad company refused to allow to furnace B the switching rates provided in the switching contract of February 24, 1896. The railroad company allowed the stipulated switching rates to furnace A, operated by the Buffalo Furnace Company, so long as this company operated this furnace, but upon the completion of furnace B and its operation by the Union Iron Works, Buffalo, N. Y., it refused to allow the stipulated rates to furnace B and insisted upon higher rates, which were paid, under protest, during the years 1899 and 1900, and which excess over these stipulated rated amounted on the shipments made to nearly $18,000, to recover which, with interest, this action is brought upon the reformed contract.

In November, 1900, both furnaces A and B were sold to a new company known as the Buffalo Union Furnace Company, whereupon the railroad company allowed the stipulated switching rates to both furnaces A and B until about the year 1906, when the Hepburn Interstate Commerce Law was passed, under which the railroad company has since claimed it has no right longer to allow such rates to either furnace. In December, 1901, the receiver of the Union Iron Works, Buffalo, N. Y., into whose hands the company had passed, began an action at common law upon the switching contract, as it stood unreformed, to recover the amount of the excess of switching charges that had been paid under protest. The plaintiff in that action sought upon the trial to show by parol evidence that the clause making the switching rates applicable to two furnaces by whomsoever operated was understood and intended to apply to furnace B, notwithstanding the clause in the beginning of the contract, limiting such rates to furnaces operated by the Buffalo Furnace Company. The trial court held that parol evidence was not admissible in an action at law for that purpose, and that the restricted clause at the beginning of the contract must be given force and effect, and would not be deemed modified or extended by the clause at the end of the contract. The plaintiff was nonsuited and appealed to the Appellate Division, Fourth Department, where the judgment was affirmed and no further appeal taken. Thompson v. Erie Railroad Company, 96 App. Div. 539, 89 N. Y. Supp. 92. An examination of the opinion in the Appellate Division will show that that court in the first place did not regard the parol evidence sought to be introduced admissible under the complaint as it stood, and that the contract, "measured and tested alone by its written terms," did not secure the switching rates for furnace B. The court did not have before it the history of the development of this switching contract and its various clauses, but simply the instrument in its entirety, and, taking it as it stood, conjectured that:

"The object of the draftsman in formulating said clause [the Wil-

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bur final clause] probably was to emphasize the idea that the benefits of said contract should be extended to any person who might be operating a furnace as assignee of the corporation named [meaning the Buffalo Furnace Company]."

The evidence now produced and admissible in the present action for reformation clearly shows that this surmise did not accord with the facts as now disclosed, but that, on the contrary, this clause was added after the remainder of the contract had been written out, and that its express purpose was to extend the benefits of the switching rates, not merely to successors or assigns of the Buffalo Furnace Company, the corporation named, as there was already a clause in the contract extending its privileges to such successors and assigns, but that such final clause, prepared by Mr. Wilbur, was expressly intended and understood to extend such privileges to two furnaces when operated by parties other than the Buffalo Furnace Company, and that the parties misapprehended the legal effect of the new clause added at the end thereof, when it should be read in connection with the original clause at the beginning thereof, limiting its privileges to furnaces operated by the Buffalo Furnace Company.

Various incidental proceedings were had in the action at law subsequent to its determination by the Appellate Division, and the action at law was not finally disposed of until the fall of 1905. The Union Iron Company of Buffalo and the Union Iron Works, Buffalo, N. Y., then formally assigned all of their rights to the plaintiff, Mr. Baird, who thereupon commenced the present action on September 12, 1905, within ten years of the date of the right of way grant and switching agreement, and within six years of the time of the payment of the excess switching rates under protest, so that plaintiff is well within the statutes of limitations applicable to the suit, either on its equitable or legal side.

The vital question of fact being thus resolved in favor of the plaintiff, and the equities, as well as the legal rights of the plaintiff, under the contract, as it is sought to be reformed, addressing themselves with persuasive force to the court, it only remains to be considered whether there are any substantial legal or controlling technical grounds for denying relief to plaintiff. The railroad company contends that there can be no reformation of the contract in suit, because neither the plaintiff nor his assignors were parties to it. While this is doubtless a correct statement of an abstract principle, it does not seem to me to be applicable to the situation in this case for various reasons.

(3) In the first place, the Union Iron Company of Buffalo, the owner of the land, and one of the plaintiff's assignors, is to be regarded as a party to the entire agreement made, as it, in fact, was between it and the furnace company and the railroad company. Indeed, there could have been no such agreement, without the Union Iron Company of Buffalo as a party thereto, as that is the company that owned the land and deeded the right of way through its land to the railroad company. This is further shown by the fact that the Union Iron Company of Buffalo is one of the parties specifically named in, and who executed that part of the entire agreement between the parties, by which the right of way was granted to the Erie Rail-

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road Company, and which instrument was delivered to, received, and recorded by the railroad company. The Union Iron Company of Buffalo is thus the party to the entire agreement, which furnished substantially the whole of the valuable consideration for that part thereof represented by the switching contract of February 24, 1896. It was therefore unnecessary for the Union Iron Company of Buffalo to sign that part of the agreement embodied in the switching contract, so long as that instrument shows, by its terms, that it was intended for the benefit of the Union Iron Company of Buffalo, as well as for the Buffalo Furnace Company, as it was intended to show and will show when reformed.

(4) It is elementary law that all of the papers constituting or intending to constitute a written agreement must be read and considered together and as one, and are to be construed in their entirety and with reference one to another. Thompson v. Erie R. R. Co., 96 App. Div. 539, 542, 89 N. Y. Supp. 92; Juilliard v. Chaffee, 92 N. Y. 536; 1 Greenleaf on Evidence, § 284a; Hutchins v. Hebbard, 34 N. Y. 24; Coddington v. Davis, 1 N. Y. 186; Hothaway v. Payne, 34 N. Y. 92, 100; Wright v. Douglass, 7 N. Y. 564, 573; Miller v. Carpenter, 68 App. Div. 346, 348, 74 N. Y. Supp. 231.

(5) Even if the switching agreement of February 24, 1896, be considered as an instrument by itself, it seems to me that, when reformed, it will inure to the benefit of the Union Iron Company of Buffalo and its successors and assigns, including its tenant, the Union Iron Works, Buffalo, N. Y., upon the well-established doctrine that a contract between parties therein specifically named may be enforced by a third party or parties for whose benefit it shows it was made, although such third parties do not execute it nor are designated therein by name, provided they are indicated so as to be capable of identification and bear a certain relationship to the parties named, entitling them to its benefits. The relationship of the Union Iron Company of Buffalo to the parties named in the switching contract and its subject-matter is clear. It, as has been shown, furnished the large and valuable consideration for the switching contract. It also appears that under the lease from the Union Iron Company of Buffalo to the Buffalo Furnace Company in existence at the time the switching contract was made the Buffalo Furnace Company not only had rights to the premises specifically leased to it, but also had trackage and storage rights through and upon that portion of the premises of the Union Iron Company of Buffalo, thereafter leased to the Union Iron Works, Buffalo, N. Y., and occupied by furnace B, and that the landlord was to have an increased rental above that regularly provided, if the price for the produce of furnace A should exceed a given amount per ton. The tenant also paid the taxes and assessments upon the entire property. Under all of these circumstances, the Union Iron Company of Buffalo was related to, and in privity with, the parties specifically named in the switching contract, so that, under the general reference therein to third parties, it and its tenants were entitled to the benefit thereof, when reformed, as it seems to me, under a long line of well-established authorities in this State. Lawrence v. Fox, 20 N. Y. 268; Pond v. New Rochelle Company, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep.

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195; Dilcher v. Nellany, 52 Misc. Rep. 364, 102 N. Y. Supp. 264, affirmed, 129 App. Div. 932, 114 N. Y. Supp. 1125, without opinion, and in Court of Appeals without passing directly on merits; Coster v. Mayor, 43 N. Y. 399, 411; Barlow v. Myers, 64 N. Y. 41, 43, 21 Am. Rep. 582.

(6) It is doubtless the law, however, that the fact that the Union Iron Company of Buffalo paid the consideration for the switching privileges granted by the Erie Railroad gives it direct rights under the switching contract, as being, in effect and in law, a direct party to that agreement, so that it need not invoke the third party doctrine at all, though its claim can doubtless be sustained upon that theory, with a large margin in its application, in its favor.

(7) The right of the plaintiff as the assignee of the Union Iron Company of Buffalo and of the Union Iron Works, Buffalo, N. Y., to recover under the contract, when reformed, can also be sustained, it sems to me, upon the theory that the covenant for the switching rates was one running with the entire tract of land of the Union Iron Company of Buffalo. This company has at all times been the owner of the entire tract in question, and granted the right of way to the railroad company through its entire tract, and was a party to the instrument granting such right of way. All of the parties to the entire contract, viz., the railroad company, the Buffalo Furnace Company, and the Union Iron Company of Buffalo, by the practical construction put by them upon the agreement, even as it stands unreformed, have agreed that the switching rates applied to two furnaces wheresoever located upon the entire tract of the Union Iron Company of Buffalo, provided only that they were operated by the Buffalo Furnace Company or its assigns, as these switching rates were given to furnace B for about six years after 1900, from which time furnace B was operated by the newly organized company, the Buffalo Union Furnace Company, which had acquired, by assignment, the rights of the switching contract from the Buffalo Furnace Company. In view of this fact, there can be no doubt as to the geographical extent of the switching covenant, and that it was to apply to two furnaces, wheresoever located upon this entire tract. With the contract reformed, so as to give the benefits of the switching rates to two furnaces, so located anywhere upon this entire tract and by whomsoever operated, it must be clear that if the covenant was originally one running with the entire lands, with the single proviso that the furnaces must be operated by the Buffalo Furnace Company or its assigns, the covenant will simply be amplified, without changing its character, under the contract as reformed, so as to inure to the benefit of two furnaces, so located, by whomsoever operated.

It only remains to be determined, therefore, whether the switching covenant is to be regarded as one running with the land, and, as to that, it seems to me there can be no reasonable doubt. That being so, the Union Iron Works, Buffalo, N. Y., as the lessee of a portion of the lands of the Union Iron Company of Buffalo, was entitled to the benefits of the switching covenant, and the plaintiff, as assignee of both, succeeds to these rights. In Anderson's Law Dictionary, it is said that:

"A covenant runs with the land when, either the liability to per-

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form it — that is, its burden — or the right to take advantage of it — that is, its benefit — passes to the assignee of the land."

It is not necessary to enter upon a lengthy discussion to show that the covenant in question is without doubt one running with the land, and a mere citation of some of the leading authorities sustaining this position will suffice. Cockson v. Cock, Cro. Jac. 125, 1 Smith's Leading Cases, p. 180, and notes; Avery v. N. Y. C. R. R. Co., 106 N. Y. 142, 12 N. E. 619; Dexter v. Beard, 130 N. Y. 558, 29 N. E. 983; Aikin v. A. V. & C. R. R. Co., 26 Barb. 289; Post v. West Shore R. R. Co., 50 Hun, 301, 3 N. Y. Supp. 172. And it is well settled that such a covenant, being incident to the land, is binding upon, and runs in favor of, those who subsequently acquire an interest in such lands, even where such subsequent parties are not named in the covenant, and without any assignment thereof to them. Norman v. Wells, 17 Wend. 149; Wooliscroft v. Norton, 15 Wis. 198; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Root v. Wright, 84 N. Y. 72, 38 Am. Rep. 495; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327.

(8) The railroad company, in accepting the right of way grant, even if it had not signed the same, became bound to perform whatever conditions were annexed to the grant and which constituted its consideration in whole or in part. See Avery, Aikin, and Post cases, above cited. These conditions were formulated in the so-called switching agreement of February 24, 1896, but doubtless inured to the benefit of the Union Iron Company of Buffalo, when that company furnished and delivered the consideration therefor to the railroad company, which it did by the right of way grant of October 4, 1895. In this connection it is to be remembered, though not vial to the validity of the claim of plaintiff as the assignee of the rights of the Union Iron Company of Buffalo, that it was shown upon the trial that a duplicate original of the switching contract of February 24, 1896, was upon its execution delivered to the Union Iron Company of Buffalo.

Having in mind in this connection that the original grant of right of way and the switching agreement are to be considered as one entire agreement to which the Union Iron Company of Buffalo was a party, there was no necessity for the execution of the switching agreement by any of the parties other than the railroad company, which created the covenant for the benefit of the land; whereas, the signatures of the Union Iron Company of Buffalo and of the Buffalo Furnace Company were necessary to the granting of the right of way instrument, they being the owner and tenant, respectively, of the premises granted, and both of these parties did execute said grant. As the switching agreement, when reformed, will make the rates thereby provided applicable to two furnaces upon the entire premises, by whomsoever operated, it was not necessary to designate, by name, the parties for whose benefit this covenant was made, as, indeed, could seldom be done in the case of continuing covenants running with the land. It must follow that, whoever so operated the furnaces in question, through rights acquired from the owner of the land for whose benefit the covenant was made, will be entitled to the advantages thereof as a covenant running with the land.

(9) Even if the switching contract of February 24, 1896, as reformed, be considered a contract by itself, it doubtless, for other rea-

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sons, creates a covenant running with the entire tract of land owned by the landlord, the Union Iron Compay of Buffalo. As has been shown, the Buffalo Furnace Company, one of the parties executing this contract, at the time of its execution and prior thereto, held a lease of the southerly portion of the entire premises, which lease, however, gave to this company certain permanent trackage rights and terminable storage privileges over the remainder of the lands of the Union Iron Company of Buffalo, afterwards occupied by furnace B, and it further appears that the Buffalo Furnace Company was in actual possession of the entire tract at the time the switching contract was made and for some time thereafter. Under the authorities, as I interpret them, the Buffalo Furnace Company therefore had sufficient interest in that portion of the premises upon which furnace B was thereafter constructed and operated, under its existing lease with the Union Iron Company of Buffalo, to procure for the entire premises a covenant running with the land, which would thereafter inure to the benefit of the landlord and his future tenants; and the force of this argument is enhanced by the fact that the landlord furnished the consideration for such covenant in the right of way granted, and which traversed the landlord's entire premises.

(10) Even if neither the Union Iron Company of Buffalo nor the Buffalo Furnace Company had any interest or rights in the lands adjoining those of the Buffalo Furnace Company, it appears to be settled that the Buffalo Furnace Company could nevertheless merely as a tenant of the premises occupied by it secure a permanent easement for its own benefit, and that of the landlord, over the adjoining lands in which neither had any interest, which easement would, upon the expiration of the tenancy, inure to the benefit of the landlord as a covenant running with the land. Dempsey v. Kipp, 61 N. Y. 462, and cases there cited. Such claim would obviously be stronger in favor of the common owner of both parcels of land involved. I am therefore satisfied that, under the facts and circumstances of this case, the contract between the parties, as it was intended and as it is to be reformed to conform to such intention, creates a covenant running with the entire lands of the Union Iron Company of Buffalo, and was for the benefit of two furnaces located anywhere upon said lands and by whomsoever operated, where such operating parties acquired their rights as tenants or otherwise from the owner of the lands, the Union Iron Company of Buffalo, and that the Union Iron Works, Buffalo, N. Y., as such tenant and operating company, was entitled to the benefit of the switching rates provided for in this covenant, and that plaintiff, as the assignee, succeeded to these rights.

The railroad company contends that the bringing of the original action at law by the receiver of the Union Iron Works, Buffalo, N. Y., upon the switching contract as it stood unreformed, amounted to an election of remedies which bars the present action for reformation and relief under the reformed contract, citing, in support of its position, Steinbach v. Relief Company, 77 N. Y. 498, 33 Am. Rep. 655, affirming 12 Hun, 640; Washburn v. Great Western Co., 114 Mass. 176; and other cases in other jurisdictions. I have carefully examined these authorities, and am satisfied that they are based upon the theory of res adjudicata, rather than the doctrine of election of remedies, as

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it appears in those cases that the plaintiff insisted on forcing the actions to a decision upon the merits, as distinguished from suffering merely a nonsuit, as was the case in the action at law between the parties now before this court.

(11) On the contrary, it appears to be well settled that the bringing of an action at law upon a contract which results in a nonsuit or a discontinuance, or anything short of a determination upon the merits, after both sides rest, will not be a bar to a subsequent action to reform the contract and for relief upon the reformed contract. Equitable Co. v. Hearne, 20 Wall. 494, 22 L. Ed. 398; Northern Company v. Grandview Company, 203 U. S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109; Spurr v. Home Company, 40 Minn. 424, 42 N. W. 206; Hillerich v. Franklin Co., 111 Ky. 255, 63 S. W. 592 (1901); Fisher v. Brown, 111 Ill. App. 492; McCloskey v. McCormack, 44 Ill. 336; Neurenberger v. Neurenberger, (Ky.) 29 S. W. 617; Steinbach v. Murphy, 143 Mo. App. 537, 128 S. W. 207 (1910); Anchor Co. v. Walsh, 20 Mo. App. 107; Johnson Co. v. Mo. P. R. R. Co., 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675. While some of the authorities in holding that an adverse judgment in an action at law upon a contract bars a subsequent suit for reformation use expressions tending to show that the doctrine of the election of remedies was in the mind of the court, a careful examination of these cases will, I think, show that they were decided upon the ground that the judgment in the prior action was one upon the merits, and that a new action under these circumstances for reformation was inconsistent with the adjudication in the prior action which, when so crowded to final determination upon the merits, constituted in a sense a conclusive election of remedies.

(12) The theory of the technical doctrine of election of remedies is that a party chargeable therewith must at the time the election was made have had knowledge of the facts from which the coexisting inconsistent remedial rights arise, and it is held that the bringing of an action which he erroneously supposes affords him a remedial right and in which plaintiff is defeated because of the error does not constitute a conclusive election, so as to preclude the bringing of a subsequent suit which will afford him a remedy. 15 Cyc. 261, and cases there cited; Sullivan v. Ross, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309; Spread v. Morgan, 11 H. L. Cas. 588, 615 (11 Eng. Reprint, 1461). It is indeed settled in this State that, to constitute a conclusive election of remedies as to the legal effect of an instrument, the party chargeable therewith must be shown, at the time he brings an action at law thereon, to have had full knowledge of such legal effect, to deprive him of the right to maintain a subsequent action to reform said instrument upon the ground of mutual misapprehension as to its legal effect. The knowledge of such legal effect of the instrument, as it stands, is in itself deemed a fact, with knowledge of which the party seeking relief is not chargeable, until such legal effect has been determined in the first action. Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430; Henry v. Herrington, 193 N. Y. 218, 222, 86 N. E. 29, 20 L. R. A. (N. S.) 249. If this were not the law and a person were always chargeable with knowledge of the legal effects of an instrument from the moment he executed it, there could never be an action to reform such an instrument upon the ground of the mutual misap-

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prehension of its legal effect, and this entire and well-recognized ground of equitable jurisdiction would itself disappear. So far as the form of the judgment of nonsuit in the prior action at law is concerned, that could not be a bar to any subsequent action, even were the cause of action the same, as it is provided by section 1209 of the Code of Civil Procedure that a final judgment dismissing the complaint does not prevent a new suit for the same cause of action, unless it was upon the merits. While the doctrine of the election of remedies is a common-law doctrine, doubtless applicable in proper cases, notwithstanding the above code provision, I am satisfied, for the reasons stated, that there was no such conclusive election of remedies in this case as to constitute a legal bar to the present suit.

The railroad company also claims that relief should be denied plaintiff on the ground of laches, as distinguished from the technical defense of the statute of limitations, claiming that the contract sought to be reformed was executed in February, 1896, and that this action was not begun until nearly ten years thereafter, the period of the statute of limitations applicable thereto. It appears, however, that the switching rates were not denied to furnace B until 1899 and 1900, and that the action at law was begun in 1901, with reasonable promptness, and the present action, in turn, was likewise speedily instituted after the action at law and the subsequent proceedings therein were terminated.

(13, 14) However, the doctrine of laches as a defense to a suit in equity implies something more than mere lapse of time, and, to constitute a defense, it must be unreasonable. The question of laches is to be decided upon the particular circumstances of each case, and a suit in equity for reformation may be brought at any time within the statutory limit of ten years, unless the delay has resulted in prejudice to the adverse party, or such a change of situation as would make it inequitable to grant relief. 16 Cyc. 152; Platt v. Platt, 2 Thomp. & C. 25, affirmed 58 N. Y. 646; Avery v. Equitable Society, 117 N. Y. 451, 23 N. E. 3.

(15) In view of these general principles, it seems to me that the plaintiff and his assignors have not been guilty of laches, depriving them of the relief sought in this action. In reaching the conclusion that the plaintiff is entitled to recover in this action, the court, sitting as one in equity, is impressed with the justice of plaintiff's claim, the conclusion being quite irresistibly forced upon the mind from the evidence in its entirety that all of the parties to the switching contract at the time it was executed intended and understood that the switching rates should inure to the benefit of two furnaces upon the entire tract of land of the Union Iron Company of Buffalo, by whomsoever operated, in consideration of the right of way obtained by the railroad company from the common owner and landlord, and that the refusal of the railroad company to accord these privileges to furnace B, when it came into existence in 1899, was an afterthought, and based upon a technical construction of the early clause of the switching agreement, limiting the privileges to two furnaces to be operated by the Buffalo Furnace Company, or its successors and assigns, and which clause, it seems to me, the plaintiff has clearly established, was inadvertently allowed to remain in the form in which it stood, after the clause giving

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such right to two furnaces by whomsoever operated had, upon the insistence of Mr. Baird and Mr. Wilbur, been added to the instrument at the end thereof, upon the mutual understanding and statement that this new clause formulated the original contract and intention of the parties on this point and under a mutual misapprehension of the legal effect of said two clauses, when read together.

The conclusion having thus been reached, that the merits of the controversy are with the plaintiff and that there are no legal obstacles in the way of affording him relief, and there being no dispute as to the amount in controversy, it follows that judgment must be ordered in favor of the plaintiff for the amount claimed in the complaint, with interest and costs.

Decision No. 1408.

LYNN v. RICHARDSON.

(Supreme Court of Iowa. May 9, 1911.)

130 N. W. 1097.

CONTRACTS — EVIDENCE — SALES.

A contract may be made by correspondence, and, aside from the statute of frauds, may be partly oral and partly in writing.

Parol evidence is inadmissible to complete or vary an insufficient written contract.

Whether a contract to sell a dental business was completed held, under the evidence, a jury question in an action for claimed breach.

Generally, if parties intend their correspondence or oral negotiations to be merely steps leading to a binding contract, no contract is made until final consummation of the negotiations through execution of the formal written agreement.

Appeal from District Court, Linn County; Milo P. Smith, Judge.

Action to recover damages for an alleged breach of a contract of sale. Defendant denied that there was any contract, and pleaded some other issues not necessary to be noted at this time. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Reversed.

L. M. Kratz, for appellant. Cook & Tourtellot, for appellee.

DEEMER, J. The parties are each dentists, and, before the happening of the matters in controversy, defendant was engaged in the practice of his profession at Cedar Rapids, Iowa, and plaintiff was likewise engaged at the town of Dysart, in this State. In the early part of November of the year 1909, defendant concluded to dispose of his business, and in some manner learned that plaintiff was a prospective purchaser. Various letters and telegrams passed between the parties and on November 9, 1909, plaintiff went to Cedar Rapids and looked over defendant's office and business. Thereupon he, plaintiff, made defendant an oral offer for his business, but, as they could not agree upon either price or terms, no contract resulted. Plaintiff

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then returned to his home, and on the 16th of November he wrote defendant the following letter:

"Dysart, Iowa, November 16th, 1909.

"Dr. L. E. Richardson, Cedar Rapids, Iowa — Dear Doctor:

"Your letter of the 15th here. As to your residence, I would rather not buy for a year or so, until I had got acquainted with the city, and saw how business was. As to my offer, I will change that offer to one thousand, and you leave everything as it is — not take out your chair or cabinet, and leave the hand instruments. Of course anything your grandfather had you could take. I have been thinking of your prices and the amount of business you do and know if a man goes in there he will have to lower them some and even then lose a good many of your patients that come to you just because it is you. As far as money is concerned, I make more clear money here than you do there, and the only object in me moving would be to live in a large town, and if it wasn't for my wife wanting to go, I would rather live here. But if you want a thousand dollars and leave everything as it is, let me know at once as time is short. Respectfully, E. C. Lynn."

To this defendant made the following response:

"Cedar Rapids, Iowa, November 30th, 1909.

"Dr. E. C. Lynn, Dysart, Iowa — Dear Doctor:

"In reply to your letter of a few days since, will state that I have been so tangled up with a couple of house deals that I was unable to tell just what I could do until now. I think now that I can accept your offer of the One Thousand and leave everything as you suggest, although it is very unusual for one to be asked to leave their small instruments as every student is supposed to have those. However, I can easily purchase more if I ever need them and you can make a list of them if you care to do so. It would suit me just as well to make the time January 15th, as January 1st, and that would give you more time there. Please let me know promptly when you will be here to close the deal, or if you prefer to do it by writing, we can arrange that. Yours truly, L. E. Richardson."

"P. S. Have seen the Kimball Bldg. people and you can lease for two or more years to suit you."

Instead of answering this letter, plaintiff went to Cedar Rapids on December 2d, called at defendant's office, and said he had come to fix up the sale; that he would pay $100 down, and the balance when he took possession; that he wanted defendant to remain in possession until February 1st, and sign a contract that he would not practice dentistry in the city of Cedar Rapids for the period of five years; that he wanted the contract to contain these as well as other conditions. Defendant testified that he refused to assent to these conditions, but, as plaintiff insisted upon them, he considered the matter for some days, and then notified plaintiff that the deal was off. In the meantime, however, plaintiff on December 7th notified the defendant that he had sold his office at Dysart, and would be able to relieve defendant by January 10th. He also stated in this letter of notification that he had not received the papers, and he requested defendant to send them, and also to state how he was getting along about renting the rooms. On December 8th defendant wrote plaintiff a letter, from which we extract the following:

"We find that it will be practically impossible for us to move away during the winter, and I have decided to keep my office until spring anyway. As I understood

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the matter the other day when you were here, the final decision was to go over for a few days until I could see this physician about the office and think over the new requirements that you wanted me to sign. At present I do not think I would sign a contract to stay out of practice here for any length of time, for while I never expect to come here again a man never knows what he might want to do, and I do not care to mortgage my future. I am sorry if this has caused you any inconvenience, and trust that you can call off your deal if you care to do so. My intentions were good but the conditions that you have imposed and the conditions here make it impossible to accept. If you care to open a new office here, I will do all I can to help you and would think that if you pushed Sonnoform as a speciality you might do well. I failed to sell my place and the physician failed to take the office as his apparatus was too large. I do not know whether my office will be for sale in the spring or not. Sincerely yours, L. E. Richardson."

This was followed by another letter dated December 16th as follows:

"Cedar Rapids, Iowa, Dec. 16th, 1909.

"Dr. E. C. Lynn, Dysart, Iowa — Dear Doctor:

"After rejecting your revised offer the other day, I closed a deal with another purchaser, as I do not understand that you had any claim upon me. I am very sorry if this has caused you any trouble, but do not see wherein I am to blame, as I had a perfect right to accept or reject any proposition named. Sincerely hoping that this has caused you no serious loss, I remain, Yours truly,

"L. E. Richardson."

No earnest money or other consideration save mutual promises passed between the parties, and, in order for plaintiff to recover, he must show a contract in writing which under our statute imports a consideration. This he claims to have done. His insistence is that the letters we have quoted, taken in connection with permissible extrinsic testimony, show a written contract, for the breach of which defendant is liable in damages.

(1, 2) It is true, of course, that a contract may be made by correspondence, and that but for the statute of frauds a contract may be partly oral and partly in writing. But parol testimony is inadmissible to complete or vary an insufficient writing. Morris v. Peckham, 51 Conn. 128; First Church v. Swanson, 100 Ill. App. 39; Brauer v. Oceanic Co., 178 N. Y. 339, 70 N. E. 863. However, this rule does not go so far as to reject testimony of the surrounding circumstances or facts from which the relation of the several writings may be inferred. Beckwith v. Talbott, 95 U. S. 289, 24 L. Ed. 496; Lee v. Butter, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466. But this rule is practically universal that the writings must contain all that is necessary to form a contract, and that defects and omissions therein cannot be supplied by verbal testimony. Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; McElroy v. Buck, 35 Mich. 434; American Oak Leather Co. v. Porter, 94 Iowa, 117, 62 N. W. 658; Watt v. Cranberry Co., 63 Iowa, 730, 18 N. W. 898.

(3) The trial court instructed squarely that the letters we have quoted, taken in connection with some earlier ones, constituted a contract of sale covering defendant's dental business, including instruments, furniture, office, and location, supplies, and the good will of his business. In this there was manifest error. Not only the corre-

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spondence, but the acts of the parties, shows that their minds never met upon either the subject-matter or the price and terms of agreement. They never progressed any further than to agree upon some general terms, and their letters and other conduct indicate that all they did by correspondence was to agree to meet to settle upon terms or to close the matter by further correspondence.

(4) Generally speaking, if the parties intend their correspondence or oral negotiations as but steps leading up to a binding contract, no contract is made until the final consummation of the negotiations through the execution of the formal written agreement. Spinney v. Downing, 108 Cal. 666, 41 Pac. 797; Weitz v. Ind. Dist., 79 Iowa, 423, 44 N. W. 696; Works v. Bristol Co., 170 Mass. 528, 49 N. E. 918; Wood v. Edwards, 19 Johns. (N. Y.) 205; Congdon v. Darcy, 46 Vt. 478. In the Weitz case, supra, it was said: "The defendant ought to have been permitted to plead as a defense that it was the understanding of the parties that a written contract should be entered into. If that was an agreement, surely no contract existed for building the house, unless the written instrument had been executed. It may be that the acceptance of the bid, had there been no statute requiring a contract to be made with the lowest responsible bidder, would have raised an agreement to enter into a contract. But this action is not upon such an agreement. It is on the contract to build the house, which, if there was an agreement that it should be reduced to writing, was in fact never entered into. See Commissioners v. Brown, 32 N. J. Law, 504; Morrill v. Mining Co., 10 Nev. 125; Fredricks v. Fasnacht, 30 La. Ann. 117; Avendano v. Arthur, 30 La. Ann. 316; Congdon v. Darcy, 46 Vt. 478; Eads v. City of Carondelet, 42 Mo. 113; Paige v. Woolen Co., 27 Vt. 485. These constructions lead us to the conclusion that the District Court erred in striking the amended answer, in excluding the evidence above referred to, and in giving the instruction quoted above." See, as further sustaining these views, Cotton v. Life Ins. Co., 115 Iowa, 729, 87 N. W. 675; Baker v. Johnson Co., 37 Iowa, 186; Brown v. Finney, 53 Pa. 373; Clay v. Ricketts, 66 Iowa, 362, 23 N. W. 755. The best that can be said of appellee's case is that it was a question of fact for a jury as announced in Herring v. Insurance Co., 123 Iowa, 533, 99 N. W. 130; Nash v. Kreling, 56 Pac. 262, and other like cases. But this is a doubtful proposition, upon which we make no pronouncement at this time. It is enough to say that the trial court erred in instructing as a matter of law that the correspondence which passed between the parties constituted a valid and enforceable contract.

Some complaint is made of the instructions with reference to the measure of damages. One of them is faulty; but the disposition of the case renders it unnecessary that we point out the exact defect.

For the error pointed out, the judgment must be, and it is, reversed.

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Decision No. 1409.

NAYLOR v. ADAMS.

(District Court of Appeal, Third District, California. March 6, 1911.)

115 Pac. 335.

BROKERS — LAND — CONTRACTS — WORK AND LABOR.

Under Cal. Civ. Code, § 1624, providing that an agreement employing a broker to sell real estate for a commission is invalid, unless the same or some memorandum thereof is in writing, signed by the party sought to be charged, letters written by the owner of real estate authorizing a broker to sell or exchange it are a sufficient writing.

In an action by a broker for his compensation in selling land, evidence held to support a judgment awarding him compensation.

Where the terms of a special contract have been varied or modified by the agreement of the parties, an action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract.

In indebitatus assumpsit for work and labor under a contract, the entire performance of which was prevented by subsequent changes in the agreement, the contract itself is admissible as an admission of the standard of value, or as proof of value, or as proof of any other fact necessary to the recovery.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Charles E. Naylor, Jr., against Frank P. Adams. From a judgment for plaintiff, defendant appeals. Affirmed.

M. J. Cheatham, for appellant. Naylor & Riggins, for respondent.

HART, J. An opinion in this cause, affirming the judgment and order of the court below, was filed by this court on December 16, 1910. A petition for a rehearing was granted by this court on the grounds: (1) That the case had not, before the filing of said opinion, been submitted on the merits; the only question then under submission having arisen on a motion to dismiss the appeal for reasons which will later appear. (2) That the writer of the opinion fell into error as to certain testimony.

Upon a reconsideration of the case we have found no reason for receding from our former conclusion that the evidence is sufficient to support the findings that a contract was entered into between Adams and Stanley by which the latter was employed to secure a purchaser of the former's land; that Stanley was to receive for that service certain compensation, of which more will appear hereafter in this opinion; that Stanley did secure such purchaser, and that Adams finally disposed of the land to the purchaser so secured.

We here adopt a part of the former opinion:

"This is an action by plaintiff to recover the sum of $600 for commissions alleged to have been earned by his assignors for consummating a real estate deal by which defendant and one Draper exchanged properties. The claim was assigned to plaintiff by the real estate firm of Murdock & Son and one Herbert Stanley, a member of

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said firm, who personally managed the transaction. The case was tried by the court and plaintiff awarded judgment in the sum sued for. This appeal is from said judgment and the order denying defendant a new trial.

(1) "Respondent has filed a motion to dismiss these appeals on the ground that the transcript does not conform to the requirements of rules 7 and 8 of the Supreme Court (78 Pac. viii), and but for the fact that the record is not so voluminous or bulky as to require in its examination more than ordinary labor we would without the least reluctance grant the motion. The transcript was prepared according to the method prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure. Rule 7, supra, provides that, when the transcript is prepared in accordance with the sections of the Code of Civil Procedure referred to, 'the paper on which the same is written and the backs for binding the same must not exceed ten inches in length and eight inches in width, and the same must be bound together on the left-hand side.'

"The transcript here is somewhat larger in size than as prescribed by the foregoing rule, but we might perhaps pass this objection to the consideration of the record without notice but for the flagrant violation of rule 8 in the preparation of said transcript. In the hope that it may be of advantage to those of the profession who appear to be at all times otherwise too much occupied to look up and examine the rules laid down by the Supreme Court governing the appellate practice in this State, we here reproduce rule 8: 'The pleadings, proceedings and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule, will be exacted of the appellant or party filing the record here in all cases, by the court, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed.'

"The transcript here does not even approximately conform to the requirements of said rule. In the first place, the proceedings constituting the record are not chronologically arranged in the transcript. The transcript begins, without any introduction, with the testimony taken. There were introduced at the trial some eighteen exhibits, which were filed and marked as exhibits, consisting of letters between the parties evidencing the agreement, and said exhibits, as well as some mortgages and deeds also received in evidence, are, in lieu of being inserted in the transcript, as they should have been, lumped together in an appendix of some fifty pages following the testimony. Moreover, the transcript is not marked by folios, as prescribed by rule 8, and consequently the index prefacing the same specifies the pages only, and even then does not designate the pages on which the exhibits may be found. While there is absolutely no excuse for presenting this or any record in the shape in which we find it, we will nevertheless, as already intimated, consider the case on its merits.

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We will therefore deny the motion to dismiss with the warning that the conclusion thus announced as to said motion is not to be accepted as a precedent for the course of this court in the future as to similar motions in which there is merit for the reasons upon which the present motion is urged."

(2) In the year 1909 said Herbert Stanley entered into negotiations with defendant for the purpose of securing authority as agent to sell the latter's land, consisting of some 1,600 acres situated in Tehama county. Stanley addressed a letter to Adams inquiring whether the latter's ranch was for sale or exchange, and requesting him to state his price for said ranch, subject to the 5 per cent. commission ordinarily allowed for such services. Adams' reply was that his ranch comprised 1,600 acres of land, for which he would take $10 an acre in cash or $12:50 per acre on an exchange for other property. Upon the receipt of this letter, Stanley undertook to sell or exchange Adams' ranch, and thereafter, Stanley having interested different persons in the proposition, a series of letters passed between Adams and Stanley concerning the proposed sale and the commission which Stanley was to receive should he succeed in disposing of the ranch. On one occasion Stanley addressed a letter to Adams, in which he advised him that he (Stanley) could make a deal by which the ranch could be exchanged for certain Alameda real estate. After looking into and considering this proposition, Adams wrote a letter to Stanley, among other things, saying: "I will say in answer to your letter offering the Alameda property that I think it is inflated, and I will not pay commissions on inflated property in full. Now, to be candid with you, I will tell you what I think is fair. I will pay $800.00 for a cash sale at $10.00 per acre, or I will pay $400 for an exchange of property that I will consider a fair exchange. That is 5 per cent. on value. I think it is not right to ask anybody to pay on inflation." Thereafter Stanley interested a Mr. T. B. Draper, of Oakland, in the Adams property, and together they went to Tehama county and visited and inspected said property. Draper was the owner of several pieces of improved real estate in the city of Berkeley. After Stanley and Draper returned to Oakland from Tehama county, the former addressed a letter to Adams, proposing to give in exchange for his ranch said real estate of Draper, which was valued at $20,000. This proposition involved a straight trade — that is, it was to be an even exchange of the two properties without any money being paid by the one to the other. The exchange on this basis did not take place, as we shall presently see. Stanley and Adams thereafter exchanged letters regarding the commissions which Stanley was to receive in the event the trade between Adams and Draper was effected. Adams, on the urgent request of Stanley, finally visited Berkeley and looked over and examined Draper's properties with a view of exchanging, upon some basis, his ranch for said properties. Stanley's letter, asking Adams to make said visit, read, in part, as follows: ". . . But I will say now, come down at once, and if you do not consider that I have earned $800, when you see property here worth $20,000, for your ranch, I will take $400." Adams, at the time of inspecting the Draper real estate, did not appear to be favorably impressed with the proposition of exchanging his ranch therefor, and returned to his home with-

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out doing anything definite one way or the other with regard to the proposed exchange.

Thereafter Stanley addresed a letter to Adams, complaining that the latter was not treating him fairly, and inclosing a written agreement, embracing the terms upon which Stanley was willing to negotiate the sale or exchange of the ranch, and to which he requested Adams to affix his signature. In this letter Stanley said, in part: "I have others who want to buy, not exchange, but I must now have an agreement that will authorize me to sell and deliver the property, or I don't want it, for I can't afford to take buyers out to see property to fool them. . . . If you want to sell (not trade) and will give me an agreement to convey if I secure a buyer let me know. . . ." Adams refused to sign said agreement. It may here be well to notice one of the points made by appellant in connection with the foregoing letter. It is claimed that the demand therein for a written agreement, with a statement by Stanley that, unless such an agreement was executed, he did not want to handle or have anything to do with the matter of selling or exchanging Adams' ranch, amounting to an abandonment by Stanley of any and all arrangements previously made with regard to the sale or exchange of said ranch. But, even if the letter referred to could well be so construed, still, the reply to said letter by Adams shows that there was an employment of Stanley by Adams as agent to sell or otherwise dispose of the latter's ranch — that is, either to sell it for cash or exchange it for property. Adams' said letter was as follows: "Your letter of the 20th inst. I got just as I got off the train at Cottonwood. You wrote it as if I went straight home. I did no such thing. I went down to Santa Cruz, and I met Mr. Draper as I was waiting for the night train at San Francisco. . . . I might trade with him yet (but it is not over likely). . . . Now you find me a buyer at $10.00 per acre and I will accept and you can get me a trade if you can suit me, and I will go down again, but I do not want you to come up, because I consider you would spoil any trade I could get. You are a very good hand to begin a sale or trade, but you are not in it to conclude one." Subsequently to the receipt of the foregoing by Stanley, the latter, accompanied by Draper, went to the ranch of Adams, and thereupon the exchange of the properties of Adams and Draper was consummated on these terms: Draper to receive the 1,600-acre tract of land of Adams, to assume the payment of a note for $2,000 in favor of the Bank of Tehama County, which said note was secured by a mortgage on said tract of land, to execute to Adams two promissory notes — one for $4,000 and the other for $700 — to be secured by mortgages on said land subordinate to the bank's mortgage, and to pay Adams the sum of $300 in cash, and to transfer to Adams "six lots with the four houses thereon at the corner of Sixth and Gilman street, Berkeley, Alameda county, Cal., and one house and lot on Haskell street, about 250 feet east of San Pablo avenue."

That Adams' letters to Stanley clearly disclose his employment of Stanley as an agent to sell the former's ranch there cannot be the slightest doubt, and this is all that is required by subdivision 6 of section 1624 of the Civil Code. Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130; Kennedy v. Merickle, 8 Cal. App. 378, 97 Pac. 81; Sanchez

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v. Yorba, 8 Cal. App. 490, 97 Pac. 205. Adams' letter, last referred to herein, authorized Stanley to secure a sale or an exchange of his ranch, his only qualification being that Stanley himself should not accompany the proposed purchaser on the visit to the ranch, for reasons suggested in said letter. And whether Stanley had or had not accompanied Draper to the ranch would be immaterial, in so far as Adams, obligation to pay Stanley the commissions to which he was justly entitled under his contract with Adams might be affected thereby.

(3) It is also clear that Adams' agreement was that Stanley should be paid 5 per cent. commission if the sale was entirely for cash, and half that amount if the bargain was effected entirely on an exchange basis. The court computed the commissions to which it found the plaintiff to be entitled upon the basis that a part of the consideration moving from Draper to Adams was in cash and a part in property. Therefore, figuring that the assumption of the mortgage debt of $2,000 subsisting against the land and the notes executed to Adams aggregating $4,700 counted for cash, the court allowed commissions thereon as well as on the $300 cash payment at the rate of 5 per cent. in accordance with the terms of Adams' offer to Stanley in the event that he made a cash sale. The commissions thus computed totaled the sum of $350. The court then obviously figured that the total value of the Berkeley property was $10,000, upon which 2½ per cent. commissions were allowed, amounting in the aggregate to $250, which sum, added to the amount allowed on the cash part of the transaction, totaled the sum which the court found was due plaintiff. This finding is justified by the pleadings and the evidence.

It is clear from the evidence, as suggested, that Stanley had performed the services which he had agreed with Adams to render in the transaction by bringing the latter and Draper together in negotiations which led to the making of the bargain, upon what basis is immaterial, so far as Stanley's right to compensation is concerned. It appears from the evidence that when Stanley and Draper met Adams at the latter's home on the day on which the trade was made, and prior to any discussion of the matter, Stanley said that he would leave Draper and Adams to conduct the negotiations themselves and to make any bargain that might be the most agreeable to them. Adams, by conduct at least, acquiesced in the course thus suggested by Stanley, and he and Draper made their bargain in the absence of Stanley.

(4) As to the complaint, the first paragraph thereof sets out defendant's agreement to pay the sum of $600 for the services rendered by Stanley in the form of a common count. The second paragraph declared upon a special contract to pay said amount. It is obvious that plaintiff relied upon his indebitatus assumpsit for a recovery. Indeed, he could not have relied upon the special contract, for said contract called for compensation either in the sum of $800 or the sum of $400, according to the nature of the bargain, whether on a cash basis or an exchange of properties.

Under the common count the proof sustains the finding and judgment of the court as to the amount. And under the circumstances it was proper — indeed, necessary — to plead the indebtedness in the form of a common count.

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(5) It is a settled rule in this State that, where the terms of a special contract have been varied or modified by the agreement of the parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract. "In such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion." Reynolds v. Jourdan, 6 Cal. 112; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Boyd v. Bargagliotti, 12 Cal. App. 237, 107 Pac. 150.

(5) In the case at bar the terms of the agreement between Stanley and Adams were necessarily changed by the terms upon which the latter and Draper agreed to exchange properties, and this change was by the act of Adams himself with the tacit acquiescence of Stanley, who, we have seen, left the negotiations directly leading to the consummation of the bargain to the former and Draper.

But counsel for appellant declares that, if plaintiff relies upon the count in indebitatus assumpsit, he has failed to make out a case, since there was no proof made that the services of plaintiff's assignor were reasonably worth the sum for which judgment has been awarded. The special contract itself was evidence upon this point, and it was for the trial court to say whether from that and other evidence received the services rendered were reasonably worth $600, and the finding of the trial court that that sum represented the reasonable value of the services performed is conclusive. It was not necessary, as counsel for appellant seems to think, that witnesses should have been produced to say that a certain sum would represent the reasonable value of the services. As stated, the contract itself was competent evidence of the standard of value and upon that evidence alone the court was authoried to fix the sum that it deemed, under all the circumstances, would amount to reasonable compensation.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

Decision No. 1410.

WINKLEBLACK v. NATIONAL EXCHANGE BANK OF SPRINGFIELD.

(Springfield Court of Appeals. Missouri. April 3, 1911. Rehearing denied May 8, 1911.)

136 S. W. 712.

PRINCIPAL AND AGENT — RATIFICATION.

By an unauthorized delegation of his authority, or by the employment of a subagent on his own account, an agent becomes personally liable for the acts of the subagent, who is regarded as his agent, and not as the agent of the principal.

An agent in whom is reposed trust or confidence, or who is required to exercise

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discretion, may not intrust the performance of his duties to another without his principal's consent.

That the principal has received or enjoyed the benefits of an unauthorized act of his agent does not constitute a ratification if he was ignorant of the facts; nor will his retention of such benefits, after knowledge of the facts, amount to a ratification if at the time he acquires such knowledge, and, without his fault, conditions are such that he cannot be placed in statu quo or repudiate the entire transaction without loss.

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by J. W. Winkleblack against the National Exchange Bank of Springfield. Judgment for defendant, and plaintiff appeals. Affirmed.

N. B. Wilkinson, for appellant. Mann, Johnson & Todd, for respondent.

NIXON, P. J. This was an action in equity to rescind the purchase and exchange of real property between appellant and respondent. The defendant obtained judgment, from which the plaintiff appeals.

The facts in this case are substantially as follows: Plaintiff, who was a resident of Atchison, Kan., was the owner of a house and lot in Kansas City, Kan., on which there was a deed of trust for $100. Defendant, a banking corporation of Springfield, Mo., was the owner of a tract of land in Howell county, Mo., which it had bid in at a foreclosure sale under deed of trust securing a note held by it. Some time prior to the trade, defendant had told the witness A. S. Cowden, who was trustee in the deed of trust above mentioned, that all it, the bank, wanted out of the land was the amount of the note for which the deed of trust was foreclosed, with the interest, and authorized him to sell the land and get the defendant back its money and make what he could by way of commission in addition to the amount going to the bank. A short time after this, Cowden spoke to the witness W. S. Alyea, a real estate agent who lived in Kansas and an acquaintance of Cowden, and asked him if he could find a buyer for the Howell county farm. Alyea then went to plaintiff and struck up a trade with him, plaintiff to trade his equity in his house and lot in Kansas City, Kan., for the Howell county land, and pay the difference by notes secured by deed of trust on the Howell county land. As a result of this negotiation, Alyea and plaintiff went to Howell county to look at the land. On their way back to Kansas City they stopped in Springfield, and went to Cowden's office. Cowden interviewed the officers of the bank in regard to the trade, and they agreed to take $400 worth of the notes so secured, provided the sum of $115 was paid in cash to the bank, which said notes and cash payment would make the bank whole on its original indebtedness, or the amount it was out on the farm. It was then agreed between Cowden, Alyea, and plaintiff that plaintiff would go home, send the abstract to his property to Springfield, and that the necessary papers conveying the property would be executed and exchanged, Alyea agreeing to

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take one note for $100 secured by said deed of trust, and to pay the bank the $115 in cash which the bank demanded in addition to the $400 in notes so secured. When the trade was finally consummated, after some delays, this deed to the Kansas City property was filled out to Alyea, and the uncontradicted testimony is that this house and lot, subject to the deed of trust then on it, went to either Alyea or Alyea and Cowden as their profit in the deal, and that the only consideration the defendant got out of the trade was the $400 in notes and the $115 in cash paid by Alyea. There is no substantial evidence in the record showing that the defendant or its agent, Cowden, made any representations whatever to the plaintiff or any one representing him that there was a house on the land, and the evidence tended to show that the officers of the bank knew nothing about the farm as to whether there was a house on it or not. In the petition the plaintiff alleges that Alyea showed him the land as the agent of the defendant, but there is no testimony in the record showing that Alyea had any connection with the defendant as its agent. There is no evidence that the defendant bank ever authorized Cowden to employ a subagent, nor is there any evidence to show that any officer of defendant bank had any knowledge of the agency of Alyea, or that he had any connection in any way with the deal prior to its consummation. Cowden testified that Alyea was not the agent of the bank, and Alyea testified that he represented the bank "through their agent, A. S. Cowden." Cowden further testified that he represented the bank in the deal, and there is no evidence that he made any representations whatever to the plaintiff as to the house being on the land. After the exchange of lands was completed, plaintiff moved to Howell county and occupied the house. On making a survey of the land which he had purchased, he ascertained that the house was not on the land, but that several years prior to his purchase it had been moved some 250 yards off the farm he purchased onto another's land.

The following evidence was given on the trial of the case: The plaintiff gave the following account of his acquaintance with Alyea: "Well, along about the 1st of November, 1908, I saw Mr. Alyea in Kansas City. I lived then in Kansas City, Kan., just across the line. The property I traded for this land was in Kansas City, Kan. I usually worked in Kansas City, Kan. I met Mr. Alyea in Kansas City, and, he being a friend of a nephew of mine, I asked him to come to my house, and while he was there I said: 'You haven't got some good farm land that you can trade me for this house and lot, have you?' He said: 'No; I haven't. If I can find anything, I will let you know. I am agent for land all over the country, and I can probably find something.' It went on about a week or so after that, and I got a card from him. Q. Well, you got information from him? A. I had information that he had 80 acres of land that belonged to some one else that he was agent for in Howell county, Mo., and asked me if I wanted to trade for it. He described the land as 80 acres, with, I believe, 500 apple trees, and so many peach trees, and a spring, and a house and other outbuildings. It was this land that I finally traded for."

Cowden, the agent of the bank, testified as follows as to the circumstances of his acquaintance with Alyea: "Well, I dont' know when

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I first met Alyea in connection with this matter. My recollection is that the foreclosure sale was on the 8th of August, 1908, and it was some time not very long after that — perhaps September, 1908. Now, when this trustee's sale was closed up and the deed delivered to the Exchange Bank, Mr. E. N. Ferguson, who was then vice-president of the bank, asked me to sell the land for them, and stated that all they wanted was their money out of it that they had invested, and, if I could get more than that, I was welcome to all I could get over and above that. I made an effort to sell it instantly, and Mr. Alyea was in the office later on. He was in there quite often when he came to Springfield, and I told him about this property, and about what amount it would take to purchase it. Q. Did he bring any one to you to purchase it after that? A. Now, about November — my recollection is that it was the day before Thanksgiving — he came to me with Mr. Winkleblack. Q. And following that the land was deeded to Mr. Winkleblack? A. Yes, sir. Q. Whom did Mr. Alyea represent in this transaction? A. As far as I know, he represented himself. Q. Did he represent the National Exchange Bank? A. No, sir; he did not. Q. Did they pay him a commission? A. No, sir. Q. Was there any agreement that they should pay him any commission? A. None whatever. Q. This trade, as I understand it, was made by Winkleblack deeding some property he had in Kansas City, Kan., and giving a deed of trust back on the farm for a certain amount? A. Yes, sir. Q. Now that land in Kansas City, Kan., to whom did that go? A. The deed was made, the way I recollect it, in blank, but the property was to go to Mr. Alyea. Q. Did it go to the bank? A. No, sir. Q. Do you know that it did go to Alyea? A. I know the deed was sent to me, and I forwarded the deed and abstract to Alyea at Atchison, Kan. Q. The bank had no interest in the Kansas City, Kan., property at all? A. None whatever. Q. What did they get out of this? A. They got $400 of these notes secured by a deed of trust. There were five notes of $100 each, and the bank got the first four notes and $115 in cash. Q. Who paid the $115 in cash? A. Alyea sent me a draft for it from Atchison, Kan. Q. That was turned over to the bank? A. Yes, sir. Q. They got no interest in the Kansas City, Kan., property at all? A. None whatever. Q. You forwarded that deed executed by Winkleblack to Alyea? A. I forwarded the deed executed by Winkleblack to the property in Kansas City, Kan., and the abstract to that property which was sent to me to Alyea at Atchison, Kan., and by return mail he sent me a draft for $115. Q. That I believe you say was executed in blank? A. That is my recollection of it, that it was executed in blank. Q. You know that the bank never had any interest in that land at all? A. None whatever. I know that they refused to have anything to do with the land." Cross-examination: "Q. Who gave Alyea a description of this property in Howell county? A. Mr. Fisher, the former owner of the property. Q. How did he come to do it? A. I think it was at my request. Q. You were acting for the bank? A. Yes, sir. Q. So far as you know, all the information that Alyea had concerning that was obtained through you and Mr. Fisher at your request? A. So far as I know, the description of the property and everything of that nature was obtained from Mr. Fisher. Q. But you sent Alyea

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to Fisher, and you were acting for the bank? A. No, sir; I didn't send him to him. I think I called Fisher up and asked him to come to my office. Q. You called Fisher up, and said, 'Here is a ma- that can tell you about this land?' A. Yes, sir. Q. And Alyea was told all about it there in your office? A. I couldn't tell you about that. Q. Now I will ask you if you didn't understand all the time after this fact was discovered — until after this trade was made — that this house was upon the land in question. Wasn't that your understanding and the bank's understanding that this house was upon the land there? A. I don't know anything about the bank at all. Q. You had conversations with Mr. Meyer, the president of the bank, didn't you? A. I never had any conversation with Mr. Meyer until this transaction was closed, or on the day on which they executed the deed. That was the first conversation I ever had with Mr. Meyer in regard to it. Q. This house had been on the land, had it not, you have learned since? A. Well, I have heard so. I don't know personally. By Mr. Johnson: Did you ever represent to Mr. Alyea or any one else that the house was on the land? A. No, sir. Q. Did they have any conversation with any of the officers of the bank in regard to this, or were all the dealings had with you? A. He dealt with me entirely. I don't think he saw any of the officers of the bank until after this deal had been closed up. If he did, I never knew anything about it."

As we have stated, soon after plaintiff and Alyea opened negotiations for the exchange of the land, Alyea and plaintiff went to Howell county and examined the land. Plaintiff gave the following account of what occurred: "We got off at Sterling — it is just a switch and flag station — and walked back along on the railroad track 40 rods I suppose, and got over into the orchard on this place and went across it, through the timber, and back through the other part — timber part — and then came back to the other side again about where we went in, and he (Alyea) said, 'Now we will go over and look at the house,' and we went over and looked at the house. There were no fences there. There were posts set at random around over the place as though there had been some, and there were some posts set something like there had been a fence, and there was a road through there. I said, 'This is the house, is it, Mr. Alyea?' and he said, 'Yes, sir;' and we went to the door, and we couldn't get in. He said, 'Here is a window that is loose,' and he just shoved the window up, and we went in through the window and looked through the lower part and two rooms above, and he said, 'Well, the house is in better shape than I expected to find it, standing here idle.' I said, 'Yes, it is. I couldn't have expected to have found it in as good shape.'"

Alyea's statement of his connection with the trade, as shown by his deposition, is as follows: "My age is 51; residence, Atchison, Kan.; vocation, real estate. I have had dealings with J. W. Winkleblack concerning said lands. I went down there in the interest of the National Exchange Bank of Springfield, Mo., through their agent, A. S. Cowden, for the purpose of disposing of the land to J. W. Winkleblack. Yes; I went in behalf of the National Exchange Bank of Springfield, Mo., through their agent, A. S. Cowden, and showed him over the land. Their agent informed me there was a house on the

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land, and I showed him the house that they told me to show. Q. State from whom you had a description of the land and its improvements prior to going down to show the land. A. From A. S. Cowden and a man named Fisher, who used to own this land. I went there for the purpose of showing this land for A. S. Cowden, the agent of the National Exchange Bank. Q. At the time you went down to Howell county with Mr. Winkleblack, did you know the owner of the land Winkleblack went to see, and, if so, state the owner, and how you knew who the owner was? A. I did. The owner was the National Exchange Bank of Springfield, Mo., and I knew that through A. S. Cowden, their agent."

On their return from Howell county, Alyea and plaintiff stopped at Springfield, where the trade was consummated. Concerning his interview with Cowden, agent for the bank, plaintiff testified: "Q. Had you ever met Mr. Cowden before? A. No, sir. We went into Mr. Cowden's office and Alyea introduced me to Mr. Cowden, and said: 'Here is Mr. Winkleblack from Kansas City, Kan., and we have been down to look at this land at Sterling.' Mr. Cowden said: 'Well, what did you conclude as to this matter?' And Mr. Alyea turned and told him then what the arrangements were, and he said to me: 'Mr. Winkleblack hasn't really said to me yet whether he is going to trade or not, but we have come up to see about it.' I told him I guessed we would make the trade if it could be made in that way, and he said, 'Well, then, we take your place with the $100 against it, and you give us $500 in notes, and we make you a deed to the other place.' I said: 'Yes; that is the way Mr. Alyea and I had talked it over as we came here.' Then Mr. Cowden said, if that was satisfactory, we would make out the deed, and that I should go back to Kansas City, Kan., and make the deed to mine and send it to him. I asked, and so did Mr. Alyea, I remember, 'Who is the deed to be made out to in Kansas City, Kan.?' and he said, 'Leave it blank.' Q. Well, you made the exchange? A. Yes, sir. Q. To whom did you make the deed to your property in Kansas City, Kan.? A. I made it in blank. . . . Q. Did you move into the house? A. Yes, sir; I moved into this house. I got the information that the house wasn't on the land before I moved down here, but just before that I had already given up my job and had gotten ready to move. Then I was notified that the house was not on the place, or that they thought it was not on the place. Probably a month after I moved into the house the agent for the land that the house is on came and told me that the house was not on my land. Q. They claimed the house, and you had the land surveyed? A. Yes; we had it surveyed. I got the county surveyor to survey it. Q. You have been living there all the time since? A. Yes, sir. Q. There is no house on the farm whatever? A. No, sir; no buildings whatever. . . . By Mr. Johnson: Q. Who did you make this trade with? A. I made this trade with W. S. Alyea. Q. He is the only one you ever conferred with in regard to it? He showed you the land? A. He showed me the land. Q. Did you ever talk to any one else before the trade was made? A. Yes, sir; to A. S. Cowden. Q. Those are the only ones you did talk to about it? A. Yes, sir."

From a careful consideration of the evidence, it is unquestionable

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that the defendant bank had no knowledge whatever of the connection or agency of Alyea in making the exchange of the lands, and the facts are undisputed that neither the officers of the bank nor Cowden as its agent represented to the plaintiff that there was any house on the land in question. Further, there is no evidence that Cowden, as agent of the bank, was in any way authorized to delegate his authority or to employ a subagent, and the officers of the bank knew nothing of the assistance Alyea was rendering in promoting the trade; so that Alyea, in showing plaintiff the land and making the representations as to the house, was at most the agent of Cowden, and, as the agent of an agent, was not the agent of the bank. There is an entire failure of evidence that Cowden, the actual agent of the bank, ever had any interview with the plaintiff, except as we have stated, and in that interview, according to plaintiff's own testimony, he made no representation that the house was on the land of the defendant and held out no such inducement to make the exchange of properties; that such representations were made entirely by Alyea. The statements of Cowden and Alyea in their testimony as to whether Cowden in fact knew or made any representation to Alyea as to the house being on the land sold to the plaintiff are so sharply conflicting as to be irreconcilable. From the fact, however, that Alyea went to Howell county with the plaintiff for the express purpose of showing him the premises and inducing the exchange of the land, and from his showing the house to plaintiff and representing that it was on the land, it is conclusive that plaintiff was induced to believe and did believe that the house was on the land, and made the exchange of the properties with that understanding.

(1) If an agent could appoint another agent without the principal's authority, and he, another agent, and the principal should be held liable for all of them, such agglutinating would result in an endless chain of interlopers, and necessarily revolutionize all present methods. The law is otherwise. (1) By an unauthorized delegation of his authority, or by the employment of a subagent on his own account, the agent makes himself personally responsible for the acts of the subagent, who is regarded as his agent and not as the agent of the principal. And, as there exists no privity of contract between the principal and such subagent, there is no liability by the principal. 31 Cyc. 1429; Commercial & Agr. Bank v. Jones, 18 Tex. 811. "Delegata potestas non potest delegari." Chouteau Land & L. Co. v. Chrisman, 204 Mo., loc. cit. 378, 102 S. W. 973. (2) The general rule is that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not intrust the performance of his duties to another without the consent of his principal; and since nearly all acts of agency involve discretion, and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself. 31 Cyc. 1425.

(2) Nor can the bank be held to have ratified the unauthorized representations by the subagent because no knowledge is brought home to it of the acts of such subagent or of his representations.

(3) The mere fact that the principal has received or enjoyed the benefits of an unauthorized act will not amount to a ratification if he did

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so in ignorance of the facts; nor will his retention of such benefits after knowledge of the facts amount to a ratification if at the time he acquires such knowledge and without his fault conditions are such that he cannot be placed in statu quo or repudiate the entire transaction without loss. 31 Cyc. 1269; Clark v. Clark, 59 Mo. App. 532. The evidence in this case shows that plaintiff made the deed to his property in Kansas City, Kan., to Alyea; that at first it was executed in blank, but that, before the deal was consummated, he was notified that Alyea was to take his house and lot in Kansas City, Kan., and pay the defendant bank the amount that was due on the purchase price of the land. Hence the title to the land had passed from plaintiff to Alyea at the time defendant was informed of plaintiff's claim of fraudulent representations. Besides, one of the notes of $100 which plaintiff had executed, secured by deed of trust on the Howell county land, had been transferred. Therefore it was impossible, without loss to the defendant, to place the plaintiff in statu quo.

Under the law and the evidence, the finding of the trial judge was for the right party, and the judgment is affirmed. All concur.

Decision No. 1411.

IN RE TALBOT & POGGI.

(District Court, S. D. New York. March 16, 1911.)

185 Fed. 986.

SALES — STOPPAGE IN TRANSITU.

Where goods shipped to the bankrupts had been removed from the vessel by the customs authorities and remained in their custody, freight and duty unpaid, without any entry having been made of them, the transportation was not complete, and the sellers were entitled to exercise their right of stoppage in transitu by notice served on the collector of customs.

Where goods shipped to bankrupts had been unloaded from a vessel and had been entered in the custom house through the bankrupts' broker, and remained in bonded warehouses in New York, freight paid but duties unpaid, the transitus was terminated, and the goods were not subject to stoppage in transitu by notice served on the collector of customs.

In the matter of bankruptcy proceedings of Talbot & Poggi. Petitions against the bankrupts' trustee by Emil Grossman, Moritz Esche, and Paul Reinhardt for the stoppage in transitu of goods shipped to the bankrupt. Granted in part.

This is a petition in a bankruptcy proceeding on behalf of the sellers of certain chattels against the trustee to stop them in transitu. The goods had been consigned to the bankrupts, and, before the notice was served, they had reached the port of New York, and the bankrupts had received the bills of lading for them. The goods are of two classes: First, those which the bankrupts had entered through their factor, and which still remain in bonded warehouses in the port of

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New York, the freight being paid and the duties remaining unpaid. The second class of goods are in what is called "general orders;" that is, they have been removed from the vessel by the customs authorities and remain in their custody, freight and duty still unpaid, no entry having been made of them. The sellers in each case have served a notice of stoppage in transitu upon the collector.

Charles Trosk, for petitioner. Frederick L. Guggenheimer, for trustee.

HAND, District Judge (after stating the facts as above). So far as concerns the goods in general order the petition must succeed. This follows from Lord Kenyon's decision in Northey v. Field, 2 Esp. 613. A similar ruling is reported as being made by Lord Ellenborough in Nix v. Olive, reported in Abbott's Shipping, p. 377. In these cases the custody of the carrier is regarded as continued by the customs officials, who take the goods from the carrier and keep them till the buyer pays duties and freight. This case was followed likewise in Burnham v. Winsor, 4 Fed. Cas. 784, and in Mottram v. Heyer, 5 Denio (N. Y.) 629. Justice Barrett, on page 258 of Fraschieris v. Henriques, 6 Abb. Prac. (N. S.) 251, says that the contention was freely conceded at the bar.

As to the other goods, the transit was over, and the trustee must succeed. I do not mean that mere entry without unlading is in itself enough, because such a contention is answered by Harris v. Pratt, 17 N. Y. 249, in which goods had been entered while the property was still on board the vessel, and in which it was held that the transit was not over. That this was the theory appears from the words of Judge Denio on page 262 of 17 N. Y. On the other hand, in Mottram v. Heyer, supra, Chancellor Walworth, on page 632 of 5 Denio (N. Y.) distinctly says obiter that, if the goods have once been landed, the freight paid, and entry made, the custody of the officials is for the benefit of the buyer and the transit is at an end. The language is too long to quote, but the following words are significant:

"And in such a case (entry under a warehousing system) I have no doubt that the right of stoppage in transitu should be considered as at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made."

He based his actual decision upon the rule of Northey v. Fields, supra, holding (page 360) that:

"The facts in evidence would have justified the jury to find that the goods were not deposited in the public store, under any warehousing provisions of the revenue law, but had been taken there by the customs house officers because the consignees had neglected to pay the duties and obtain a permit to land the goods."

This is also the explanation given of the case by Justice Barrett in Fraschieris v. Henrique, supra, pages 259, 260, of 6 Abb. Prac. (N. S.), which is itself directly in point upon the facts at bar.

Cartwright v. Wilmerding, 24 N. Y. 521, although a case under the factor's act, is also significant, because the question there arose as to whether the consignee had got possession of the goods, which is the determining question in stoppage in transitu. The facts were that the factors had entered the goods for warehousing, had paid the freight,

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and deposited them in the bonded warehouse, but had not paid the duties. It was held that the custody for duties by the government did not destroy the buyer's possession. Chancellor Walworth's dictum in Mottram v. Heyer, supra, is quoted at length apparently as though it had been part of the decision, and Justice Gould relies on it as an authority.

I can find no contradiction anywhere in the authorities, and I believe it to be well-settled law that goods which have been unladed and remain, freight paid, in bonded warehouse after entry, are in the possession of the buyer, and that the transit is at an end. The question always is, in the words of Judge Denio in Harris v. Pratt, supra, page 252 of 17 N. Y., whether "the goods remain in the possession of persons concerned in their transportation." The collector holding entered goods for duties only is not such a person. The case is analogous to this: Suppose that the carrier had deposited them in a warehouse which had run up charges against them. As soon as the consignee paid the freight, and the warehouseman had attorned to him, the transitus would be over, for the warehouseman's charges were for safe-keeping and did not concern the transportation of the goods. The custody of the collector under the warehousing system is even less a charge for transportation, and entry under the statute gives the full control which would result from attornment. The question all turns on whether the collector's possession is a mere continuance of the carrier's, or is solely for the duties, leaving the consignee otherwise full jus disponendi. When the freight has been paid and the goods entered, it is the latter.

Let an order pass in accordance herewith.

Decision No. 1412.

MOSBY v. LARUE.

(Court of Appeals of Kentucky. May 2, 1911.)

136 S. W. 888.

SALES — WARRANTY.

The measure of damages for breach of warranty of mules is the difference between the fair value of the mules, if as represented, and their value in the condition they were at the time of sale.

In an action for damages for breach of warranty, it was error for the court to instruct the jury that, unless the defendant warranted the mules to be sound in every respect, the law is for the defendant, unless the mules were unsound at the time of sale, and known to be unsound by defendant, but not known by plaintiff, or not reasonably apparent, when there was no charge of fraud in plaintiff's petition.

In an action for breach of warranty of mules, an instruction that if the only representation made with reference to the mules was that they were sound so far as defendant knew, and if at that time he had no knowledge or information of the unsoundness, you will find for the defendant, even though they were unsound, was erroneous.

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Representations as to the condition of mules, made at the time of sale, and which induced the purchase, and accompanied by a statement of the seller that he would "stand behind" the mules, are warranties.

Appeal from Circuit Court, Carlisle county.

Action by Mrs. Luda M. Larue against Bob Mosby. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

John E. Kane, for appellant. Smith, Hindman & Wyatt, for appellee.

HOBSON, C. J. Mrs. Luda M. Larue bought of Bob Mosby two mules, for which she paid him $465 in the spring of the year 1910. On October 15th following she brought this suit against him, alleging in her petition that he warranted the mules to be sound in every respect, that they were unsound, and that she had been damaged by reason of the breach of the warranty in the sum of $465. The defendant filed an answer traversing the allegations of the petition. The proof on the trial showed that the mules were bought of Mosby by Mrs. Larue's brother and son acting as her agents. They testified in effect that Mosby said at the time to them that the mules were all right in every respect; that he would stand behind them and make them good. Young Larue told him that he had bought a mule the year before that had bad eyes and he did not want to buy another bad mule. Mosby replied to this that he would stand behind the mules, and Larue took him at his word and took the mules. The proof for the plaintiff also showed that one of the mules was moon-eyed and became blind; the other was listless, could not stand work, had several spells, and finally died on July 4th. Twelve days after Mrs. Larue got the mules she tendered them back to Mosby and demanded the money, but he refused to take them, and it was then agreed that she would take the mules home, and they would arbitrate the question of damages; but, the arbitration not having been had, she brought this suit. The proof for Mosby was to the effect that he did not make any representation as to the soundness of the mules; that they were sound at the time he delivered them; and that the troubles they suffered from were due to the treatment they received after Mrs. Larue got them. On this evidence the court instructed the jury as follows:

"(1) The court instructs the jury that if they believe from the evidence, at the time the defendant sold the two mules to plaintiff, said defendant then and there warranted said mules to be sound in every respect, and you believe further from the evidence that said mules were not sound in every respect, that one of said mules was afflicted with weak eyes, and the other one died resulting from unsoundness affecting it at the time of the sale, then you will find for plaintiff the reasonable cash market value of the dead mule at the time of the sale, and further the difference in the value, if any, between the other mule as it is, and the same mule if sound at the time of sale (if you believe it was unsound at said time) not exceeding the sum claimed, $465.

"(2) The court instructs the jury that, unless they believe from the evidence defendant warranted the two mules to be sound in every re-

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spect, the law is for the defendant, and you should so find, unless you should further believe from the evidence that said mules were unsound at the time of sale and known to be unsound by defendant, and that any defect in said mules, if any, was not known to plaintiff, and that said unsoundness, if any, was not apparent to any person of ordinary prudence, in which latter event the law is for plaintiff, and you should find as in instruction No. 1.

"(3) The court instructs the jury that if they shall believe from the evidence that the only representation made with reference to said mules by defendant to plaintiff or her agent was that the same were sound as far as he knew, and that at the time he did so he had no knowledge or information of the unsoundness of said mules, if any existed, the law is for the defendant, and you should so find, although you may believe from the evidence, as a matter of fact, that said mules or either of them were unsound at the time he sold and delivered the same to plaintiff."

Under these instructions the jury found for Mrs. Larue in the sum of $360. Mosby appeals.

(1) The first instruction does not properly define the measure of damages. Although one of the mules was unsound when delivered and afterwards died, Mrs. Larue had used the mule from the time she got him until July 4th, and the measure of damages, if the warranty was broken, was the difference between the value of the mule in the condition he was at the time of the sale and his value if in the condition he was warranted to be. As to the other mule, it was error to tell the jury that the measure of damages was the difference in its value as it is — that is, at the trial — and its value if sound at the time of the sale. The measure of damages is the same as to this mule as to the other.

(2) Instruction 2 should not have been given, as the action was brought on the warranty, not for fraud. There was no charge in the petition that the defendant had practiced a fraud upon the plaintiff and had sold her property which he knew to be unsound. The action was simply brought on the warranty.

(3) The third instruction was unnecessary and should not have been given. On another trial the court will, in substance, instruct the jury: (1) That if the defendant represented to the plaintiff's agent at the time the mules were sold that the mules were sound in every respect and he would stand behind them, and the mules or either of them were not sound in every respect, they should find for the plaintiff; and unless they so believed they should find for the defendant. (2) That if they find for the plaintiff they should find for her the difference, if any, between the fair value of the mules, or either of them, if as represented, and their fair value in the condition they were at the time of the sale. These are all the instructions that need be given.

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Decision No. 1413.

GARDINER v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. April 4, 1911.)

94 N. E. 876.

CARRIERS.

A clause in a contract simply releasing a carrier from liability for loss of goods will not include a case of its own negligence, unless such exemption be expressly and plainly stated, and a provision in a ticket that the carrier's liability for baggage belonging to each passenger shall not exceed $50, which ticket was issued under a tariff providing that for baggage belonging to one passenger the company would not accept a greater liability than $50, would not release the carrier of liability for its own negligence.

A clause in a contract of shipment in consideration of reduced rates limiting the liability of a carrier to a specified valuation will include loss arising from negligence without express mention thereof.

A ticket issued in consideration of reduced rates provided that the carrier's liability for baggage should not exceed $50, such ticket being issued under a tariff providing that wearing apparel only would be checked as baggage on such ticket, and that the carrier would not accept a greater liability than $50. Held, that the provision was not a mere general clause releasing the carrier from liability without reference to the character and value of the goods, so that the carrier was released for loss from its own negligence, though such exemption was not expressly mentioned.

A provision in a ticket sold at a reduced rate limiting baggage to wearing apparel only and the liability of the carrier therefor to $50 is not unreasonable or unjust as matter of law.

Where a passenger fully understands a clause in a ticket bought at a reduced rate, fixing a valuation on baggage and limiting the carrier's liability to such amount, which provision is not unreasonable as matter of law, the provision is binding, though the carrier fixes the valuation without negotiation and without express tender of opportunity to name a different valuation.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Edith V. Gardiner against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (139 App. Div. 17, 123 N. Y. Supp. 865) affirming a judgment overruling a demurrer to a partial defense, plaintiff appeals by permission on certified questions. Affirmed and questions answered in the affirmative.

See, also, 140 App. Div. 907, 125 N. Y. Supp. 1121.

This is an appeal by permission on certified questions from an order and judgment (139 App. Div. 17, 123 N. Y. Supp. 865) of the First Appellate Division affirming an interlocutory judgment of the Supreme Court overruling plaintiff's demurrer to the partial defense contained in defendant's answer. The action was brought to recover several hundred dollars as the alleged value of certain baggage received and checked by defendant for plaintiff and claimed to have

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been lost through the negligence of the former. The substance of the partial defense which has been demurred to is as follows:

The plaintiff, as passenger, was riding and her baggage was checked on and under a special form of ticket known as a "50-trip family ticket," which was issued at reduced rates in conformity with the provisions of defendant's tariff filed with the Public Service Commission as provided and required by law. Said ticket contained the following conditions: "Conditions. In consideration of the reduced fare at which this ticket is sold, the purchaser agrees that its use shall be subject to the following conditions: . . . (3) That this company's liability for baggage belonging to each passenger shall not exceed fifty dollars ($50)." That plaintiff knew of and assented to the conditions contained in said ticket and thus became bound thereby and limited in her claim to said sum of $50. The tariff filed and under which said ticket was issued as aforesaid, in addition to a schedule showing the reduced rates at which tickets of that class were sold, contained, amongst others, the following provisions:

"(10) Baggage. (a) Wearing apparel only will be checked as baggage on tickets at fares named herein, and for such baggage belonging to one passenger this company will not accept a greater liability than $50.00. The weight of baggage which will be carried free is explained in the following paragraph:

"(11) Excess Baggage. — Baggage in excess of free allowance will be charged for in accordance with excess baggage rates as shown in Baggage Tariff," etc.

Joseph Larocque, for appellant. William Mann, for respondent.

HISCOCK, J. (after stating the facts as above). Appellant alleges that her baggage checked by respondent under a special form of ticket issued at reduced rates was lost through the carrier's own neglect, and the criticism made of the latter's partial defense setting up a clause in said ticket limiting its liability to a specified amount is that such clause does not expressly excuse the respondent's own negligence as bailee, and therefore is not a defense in this case where such neglect is relied on.

The question thus raised under the circumstances of this case will be a narrow one. Its determination will be controlled by the interpretation and meaning which we shall give to the limitation clause above quoted and will not involve any uncertain groping for general principles which are to govern its effect after such interpretation has fixed its proper meaning.

(1, 2) Counsel for the appellant is entirely right in his claim that a clause simply releasing a carrier from liability for loss of goods will not include a case of its own negligence unless such exemption is expressly and plainly stated. He concedes also correctly that a clause in consideration of reduced rates properly and reasonably limiting the liability of a carrier to a specified valuation of the goods received by it will include a case of a loss or damage arising from its own negligence without express mention thereof. There can be no doubt about this proposition since our recent decision in Tewes v. North German Lloyd S. S. Company, 186 N. Y. 151, 78 N. E. 864, 8 L. R, A, (N. S.) 199. He contends that the clause here involved is not sufficient within

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the principle first stated because it does not expressly excuse the respondent's own negligence, and in that contention I agree with him.

(3) He then finally reaches the debatable ground of the case, and insists that the provision which has been quoted is not sufficient under the principle secondly stated because it is not one of limited or fixed valuation, and therefore effective without express enumeration of such negligence. With this contention I do not agree, but think that the clause is to be construed as one relating to and fixing a valuation on appellant's baggage and limiting respondent's liability thereto in consideration of reduced rates. The choice is between an interpretation that this was a mere general clause releasing the carrier from liability without any reference to the character and value of the goods and one that it fixed the amount and value of free baggage which a passenger could check on this ticket and limited the carrier's liability to that amount.

Of course, it was not necessary to use the specific word "value" or "valuation" in order to frame a clause of limited valuation and liability. If the fair meaning and purpose of the clause as understood and intended by the parties was to fix a liability based on a reduced and limited valuation of goods in consideration of reduced rates of fare, we ought to enforce this meaning, and carry out this purpose, if permissible. In determining what must have been the understanding of the parties concerning the meaning of the clause at the time when plaintiff checked her baggage under the ticket containing it, it will be well to recall some of the general statutory and other legal rules which surrounded that transaction, and with knowledge of which she must be charged. She knew that under long-established rules on a ticket at full rates she could compel the respondent to transport all of the property which she might properly check as baggage at its full value. She also must be charged with knowledge of the statute, section 38 of the public service commissions law (Laws 1907, c. 429), which provided, in absence of special contract: "Every common carrier and railroad corporation shall be liable for loss, damage, and injury to property carried as baggage up to the full value and regardless of the character thereof, but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier;" and also with knowledge of the provisions of said act (section 33) "that nothing in this act shall prevent the issuance of mileage . . . or commutation passenger tickets, . . . with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand miles or more," and requiring (section 28) every common carrier to file and give public notice of "schedules showing the rates, fares and charges for the transportation of passengers and property;" also with knowledge of the schedule heretofore quoted filed by respondent with the public service commission, providing, in case of such a ticket as she was using, "Wearing apparel only will be checked as baggage on tickets at fares named herein, and for such baggage belonging to one passenger this company will not accept a greater liability than $50.00."

With these statutes and principles presumably in her mind, and telling her that, independent of statute, she had a right under an unlimited ticket to enforce upon the respondent a liability for the full

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value of anything properly constituting baggage, and that under the statute she had a right on proper terms to enforce upon it a liability of full valuation of anything which she might desire to have transported as baggage "regardless of the character thereof," plaintiff preferred to secure a better rate of transportation and check her baggage under a tariff schedule and ticket which limited her as to the character of baggage and as to the amount for which liability would arise. She must necessarily have understood, as it seems to me, that, although she could hold the respondent for the full value of anything she wanted to check as baggage, she was consenting to a restriction of the character and on the value of what she might check; that when the tariff schedule explained that "wearing apparel only will be checked as baggage . . . and for such baggage this company will not accept a greater liability than $50,00," and her ticket said the company's "liability for baggage shall not exceed $50.00," it meant that the company would not be liable for the value of baggage beyond the sum mentioned and thereby the value was fixed at that amount as a limit of liability. I do not see how the clause reasonably could be given any other relation, meaning, or effect. The clause certainly was not one imposing a penalty of $50 on the carrier for misconduct, and nobody I think will claim that it fixed an amount of liquidated damages which could be recovered in a case of loss of the baggage independent of its value. The plaintiff would not be allowed to recover even this $50 by simply showing that she had checked and lost her baggage, but she would be compelled to prove that it was worth at least $50. Conversely, when she attempts to establish that her baggage was worth more than $50, the respondent, as I think, is entitled to invoke the benefit of this clause, and say, "You shall not recover for a valuation in excess of $50 because we have limited our liability to that amount of value."

Probably no one will ever point to this clause as a model in form, yet it is not far different in effect from the one interpreted in the Tewes case. There the clause which was held to be one of limited valuation and liability provided, "Nor shall this company be liable for any loss or damage or any box, package or thing for over fifty dollars unless the true and just valuation is herein stated." The first portion of the clause is for all practical purposes identical with the one now under review. All that can be claimed to aid in making a valuation clause which does not exist in this case is the last portion of the provision that the limited liability should prevail "unless the true and just value thereof is herein stated." But under the circumstances adverted to that sentence hardly differentiates that case from this. The defendant there secured a limited liability, unless, as expressly stated in the ticket itself, the shipper gave a valuation of a larger amount. The respondent here secured a limited liability unless the appellant desired an enlarged liability for the full valuation of the goods, and which the law and respondent's tariff schedules told her how to secure. In either case the meaning and effect of the limited liability clause was the same. It limited the valuation of the goods which the shipper might prove against the carrier, unless the former elected on proper terms to secure a liability for a full or larger valuation. In one case the ticket itself suggested the right to fix a

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greater valuation. In the other the statute and rules, presumably present in the mind of the shipper, suggested and guaranteed the same right.

It seems to be argued as a secondary and, perhaps, subordinate, proposition, that, even should the clause which we have discussed be interpreted as one of valuation instead of mere release from liability, it is defective, and therefore ineffective because the carrier arbitrarily fixed the valuation and did not specifically tender to the passenger the opportunity to name a different one. I do not think that this contention can be sustained if it is relied on.

(4) I do not understand it to be argued, nor can it well be in my opinion, that the amount fixed by the carrier was unreasonable or unjust as matter of law. No attempt was made to impose some illegal condition on the right of the passenger to fix a greater value, but the rights which she had in this direction and already referred to were left unimpaired. In these respects the case differs from those cited by the appellant of The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; Eells v. St. Louis, etc., Ry. Co. (C. C.), 52 Fed. 903; Schwarzchild v. Nat. S. S. Co. (D. C.), 74 Fed. 257. It is admitted, also, that the appellant knew of and fully understood the clause.

(5) Under such circumstances, it is established by authorities which should be controlling with us that the shipper assents and agrees to the valuation adopted by the carrier, and that this agreement is not rendered less binding because the carrier has fixed the valuation without negotiation and without express tender to the shipper of opportunity to name a different one.

As I have already suggested, it was unnecessary for the respondent to point out to the appellant that she could compel it to carry her baggage at a different valuation and without limitation of liability. The statutes and rules of law outside of the statute notified her of that right and secured it to her. She could not at the same time cling to an unlimited liability and to a reduced rate of transportation, and under her contract she exercised her option and enjoyed all of her rights by letting go of the former and holding on to the latter with its defined consequences as to baggage. Zimmer v. N. Y. C. & H. R. R. R. Co., 137 N. Y. 460, 33 N. E. 642; Hart v. Penn. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Cau v. Texas & Pac. Ry. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; Arthur v. Texas & Pac. Ry. Co., 204 U. S. 505, 514, 27 Sup. Ct. 338, 51 L. Ed. 590; Hohl v. Norddeutscher Lloyd, 175 Fed. 544, 99 C. C. A. 166.

The learned counsel for the appellant has with much pains and industry collected and discussed many cases which he insists sustain his views of the clause under discussion. It will not be possible within reasonable limits to review these cases in detail, but, as I think, all of those in the appellate courts of this state may be plainly distinguished from the present one or else have already been limited in their application. Several of them are of the same class as Mynard v. Syracuse, B. & N. Y. R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28, where the court discussed what was plainly a general release from all liability and not a limitation on the amount thereof. Others, like Rosenthal v. Weir, 54 App. Div. 275, 66 N. Y. Supp. 841, and Rath-

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bone v. N. Y. C. & H. R. R. R. Co., 140 N. Y. 48, 35 N. E. 418, were disposed of on peculiar features not prevailing in this case. The case of Bermel v. N. Y., N. H. & H. R. R. Co., 62 App. Div. 389, 70 N. Y. Supp. 804, affirmed 172 N. Y. 639, 65 N. E. 1113, must be regarded either as decided on the special features of that case or else as limited in its application to a case like the present one by our decision in the Tewes case. Not one of these cases, unless it be the Bermel case, holds that a clause like the present one limiting rather than wholly releasing from liability may not be regarded in effect as one of valuation, and therefore effective even against the carrier's negligence.

The order should be affirmed, with costs, and the question certified to us answered in the affirmative.

VANN, J. (dissenting). The defendant, a common carrier, admits that the plaintiff was its passenger, and that it undertook to safely transport herself as well as her baggage, worth the sum of $1,359, to the place of destination, and that such baggage was lost through its own negligence. It pleads, however, that it is not liable for the loss of the baggage to an amount exceeding $50, because the ticket sold by it to the plaintiff contained the "condition," founded on a reduced fare, that "this company's liability for baggage belonging to each passenger shall not exceed fifty dollars." Assuming that this condition limits the liability of the defendant as an insurer for a loss occurring through want of care on its part, the question presented for decision is whether it also limits its liability as bailee for a loss arising from its own negligence.

In a recent case, following others that preceded it, we held that "contracts" intended to limit the liability of a common carrier are to be construed strictly against the carrier. A common carrier has two distinct liabilities — one for losses by accident or mistake, where he is liable as an insurer, the other for losses by default or negligence, where he is answerable as an ordinary bailee. Provisions in a bill of lading issued by a railroad company, intended to limit its liability for loss or damage to the goods carried, will, unless otherwise expressly stipulated, be construed to relate to the carrier's common-law liability as an insurer and not to his liability as a bailee for hire." Bermel v. N. Y., N. H. & H. R. R. Co., 62 App. Div. 389, 70 N. Y. Supp. 804; Id., 172 N. Y. 639, 65 N. E. 1113.

In Wheeler v. Oceanic Steam Navigation Co., 125 N. Y. 155, 161, 26 N. E. 248, 249, 21 Am. St. Rep. 729, Judge Finch, after reviewing certain cases, wrote for all the judges as follows: "These cases show that the liability for negligence as bailee survives even when by special contract the carrier has thrown off his liability as such; and the courts of this State have exhibited a very decided purpose to retain and enforce that liability wherever it is possible. Even that may be thrown off by force of a special agreement, but we have refused to permit any general words to accomplish such result, and have insisted that, where the carrier seeks to contract against the consequences of his own negligence, he must say so openly and plainly so as not to be in the slightest degree misunderstood. . . . Nicholas v. N. Y. C. & H. R R. R. Co., 89 N. Y. 372."

The defendant claims to have thrown off its liability as bailee by

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virtue of the "condition" above quoted, which it regards as a special agreement of valuation. I cannot assent to this position under the rule of strict construction against the carrier, which, unless many precedents are to be disregarded, must be applied in this case. There is nothing in the stipulation that suggests valuation to my mind. Neither the word "value" nor "valuation," nor any equivalent word or expression, appears in the "condition," which is simply an arbitrary and flat limitation of liability to the sum of fifty dollars, not as a valuation, but as a limitation, pure and simple. The opportunity, afforded in many of the reported cases, to declare a higher value and pay a higher rate, was not given to the plaintiff. Such a provision shows an intention to value at the sum named, by offering as an alternative the chance to value at a higher rate, if the shipper so elects. There was no express valuation, and a valuation by implication is not stated "in unequivocal terms" or "so that it cannot be misunderstood" as the cases require. Mynard v. Syracuse, B. & N. Y. R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Nicholas v. N. Y. C. & H. R. R. R. Co., 89 N. Y. 370; Canfield v. Balt. & O. R. R. Co., 93 N. Y. 532, 45 Am. Rep. 268.

As was said in Kenney v. N. Y. C. & H. R. R. R. Co., 125 N. Y. 422, 425, 26 N. E. 626, 627: "Our decision, however, is placed upon the ground that this contract does not in unmistakable language provide for an exemption from liability for the negligence of the defendant's employees. The rule is firmly established in this State that a common carrier may contract for immunity for its negligence, or that of its agents; but that, to accomplish that object, the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement ipsissimis verbis."

The plaintiff did not agree directly or indirectly that her baggage should be valued at the amount named or at any amount. There was no mutual valuation and no reference was made to a loss by negligence. Instead of saying "openly and plainly" that her baggage was "valued at," or was received "at a valuation of," or something that would call her attention to the subject, nothing whatever was said to even suggest that a valuation was intended. Unless we reverse our well-established rule of strict construction against the carrier and lay down its opposite of strict construction against the passenger or shipper, this judgment cannot logically be sustained.

The claim that the Bermel case, decided in 1902, was overruled by a later case decided in 1906, has slender support when the facts of the two cases and the opinions written therein are compared. Tewes v. North German Lloyd Steamship Co., 186 N. Y. 151, 152, 78 N. E. 864, 865, 8 L. R. A. (N. S.) 199. In the latter case there was a limitation of liability "beyond the amount of fifty dollars," but this was directly followed by the significant provision, "unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon."

I find no case in this court nor any well-considered case in any

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court holding that there was a valuation agreement, unless there was either a stipulation making a valuation in express terms, or a reservation in favor of the skipper or the right to value himself and pay accordingly.

I vote to reverse and to answer the question certified in the negative.

WERNER, CHASE, and COLLIN, JJ., concur with HISCOCK, J. CULLEN, C. J., and WILLARD BARTLETT, J., concur with VANN, J.

Order affirmed.

CHAPTER —— OF THE LAWS OF 1911 OF THE STATE OF NEW YORK.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article five of chapter forty-five of the laws of ninteen hundred and nine is hereby amended by adding thereto a new article five, to read as follows:

ARTICLE 5.

SALES OF GOODS.

Section 82. Contracts to sell and sales.
83. Capacity; liabilities for necessaries.
84. Form of contract or sale.
85. Statute of frauds.
86. Existing and future goods.
87. Undivided shares.
88. Destruction of goods sold.
89. Destruction of goods contracted to be sold.
90. Definition and ascertainment of price.
91. Sale at a valuation.
92. Effect of conditions.
93. Definition of express warranty.
94. Implied warranties of title.
95. Implied warranty in sale by description.
96. Implied warranties of quality.
97. Implied warranties in sale by sample.
98. No property passes until goods are ascertained.
99. Property in specific goods passes when parties so intend.
100. Rules for ascertaining intention.
101. Reservation of right of possession or property when goods are shipped.
102. Sale by auction.
103. Risk of loss.
104. Sale by a person not the owner.
105. Sale by one having a voidable title.
106. Sale by seller in possession of goods already sold.
107. Creditors' rights against sold goods.
108. Definition of negotiable documents of title.
109. Negotiation of negotiable documents by delivery.

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110. Negotiation of negotiable documents by indorsement.
111. Negotiable documents of title marked "not negotiable."
112. Transfer of non-negotiable documents.
113. Who may negotiate a document.
114. Rights of person to whom document has been negotiated.
115. Rights of person to whom document has been transferred.
116. Transfer of negotiable document without indorsement.
117. Warranties on sale of document.
118. Indorsement not a guarantee.
119. When negotiation not impaired by fraud, mistake or duress.
120. Attachment or levy upon goods for which a negotiable document has been issued.
121. Creditors' remedies to reach negotiable documents.
122. Seller must deliver and buyer accept goods.
123. Delivery and payment are concurrent conditions.
124. Place, time and manner of delivery.
125. Delivery of wrong quantity.
126. Delivery in installments.
127. Delivery to a carrier on behalf of the buyer.
128. Right to examine the goods.
129. What constitutes acceptance.
130. Acceptance does not bar action for damages.
131. Buyer is not bound to return goods wrongfully delivered.
132. Buyer's liability for failing to accept delivery.
133. Definition of unpaid seller.
134. Remedies for an unpaid seller.
135. When right of lien may be exercised.
136. Lien after part delivery.
137. When lien is lost.
138. Seller may stop goods on buyer's insolvency.
139. When goods are in transit.
140. Ways of exercising the right to stop.
141. When and how resale may be made.
142. When and how the seller may rescind the sale.
143. Effect of sale of goods subject to lien or stoppage in transitu.
144. Action for the price.
145. Action for damages for nonacceptance of goods.
146. When seller may rescind contract or sale.
147. Action for converting or detaining goods.
148. Action for failing to deliver goods.
149. Specific performance.
150. Remedies for breach of warranty.
151. Interest and special damages.
152. Variation of implied obligations.
153. Rights may be enforced by action.
154. Rule for cases not provided for by this article.
155. Provisions not applicable to mortgages.
156. Definitions.
157. Article does not apply to existing sales or contracts to sell.
158. No repeal of uniform warehouse receipt laws or uniform bills of lading laws.

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Section 82. Contracts to sell and sales. 1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

3. A contract to sell or a sale may be absolute or conditional.

4. There may be a contract to sell or a sale between one part owner and another.

§ 83. Capacity; liabilities for necessaries. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

§ 84. Form of contract or sale. Subject to the provisions of this article and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

§ 85. Statute of frauds. 1. A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

§ 86. Existing and future goods. 1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this article called "future goods."

2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

3. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

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§ 87. Undivided shares. 1. There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

§ 88. Destruction of goods sold. 1. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

2. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale —

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

§ 89. Destruction of goods contracted to be sold. 1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract —

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

§ 90. Definition and ascertainment of price. 1. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

2. The price may be made payable in any personal property.

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3. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this article shall not apply.

4. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

§ 91. Sale at a valuation. 1. Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

2. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by the appropriate parts of this article.

§ 92. Effect of condition. 1. Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the nonperformance of the condition as a breach of warranty.

2. Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

§ 93. Definition of express warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

§ 94. Implied warranties of title. In a contract to sell or a sale, unless contrary intention appears, there is

1. An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

3. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee or other person professing to sell by virtue of

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authority in fact or law goods in which a third person has a legal or equitable interest.

§ 95. Implied warranty in sale by description. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not correspond with the description.

§ 96. Implied warranties of quality. Subject to the provisions of this article and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

5. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

6. An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

§ 97. Implied warranties in sale by sample. In the case of a contract to sell or a sale by sample:

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in subdivision three of section one hundred and twenty-eight.

(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

§ 98. No property passes until goods are ascertained. Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section eighty-seven.

§ 99. Property in specific goods passes when parties so intend.

1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

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2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

§ 100. Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. 1. When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

2. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer —

(a) When he signifies his approval or acceptance to the seller, but retains the goods without giving notice of rejection; then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. 1. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section one hundred and one. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

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§ 101. Reservation of right of possession or property when goods are shipped. 1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

2. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, excepting for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

3. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

4. Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

§ 102. Sale by auction. In the case of sale by auction —

1. Where goods are put up for sale by auction in lots each lot is the subject of a separate contract of sale.

2. A sale by auction is complete when the auctioner announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

3. A right to bid may be reserved expressly by or on behalf of the seller.

4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

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§ 103. Risk of loss. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that —

(a) Where delivery of goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

§ 104. Sale by person not the owner. 1. Subject to the provisions of this article, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2. Nothing in this act, however, shall affect —

(a) The provisions of any factors' act, recording act, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

§ 105. Sale by one having a voidable title. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

§ 106. Sale by seller in possession of goods already sold. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

§ 107. Creditors' rights against sold goods in seller's possession. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

§ 108. Definition of negotiable documents of title. A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

§ 109. Negotiation of negotiable documents by delivery. A negotiable document of title may be negotiated by delivery —

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(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

§ 110. Negotiation of negotiable documents by indorsement. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

§ 111. Negotiable documents of title marked "not negotiable." If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

§ 112. Transfer of non-negotiable documents. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

§ 113. Who may negotiate a document. A negotiable document of title may be negotiated —

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

§ 114. Rights of person to whom document has been negotiated. A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for

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value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

§ 115. Rights of person to whom document has been transferred. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferror, the title to the goods, subject to the terms of any agreement with the transferror. If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document. Prior to the notification of such bailee by the transferror or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferror, or by a notification to such bailee by the transferror or a subsequent purchaser from the transferror of a subsequent sale of the goods by the transferror.

§ 116. Transfer of negotiable document without indorsement. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferror is essential for negotiation, the transferee acquires a right against the transferror to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

§ 117. Warranties on sale of document. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(a) That the document is genuine;

(b) That he has a legal right to negotiate or transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

§ 118. Indorser not a guarantor. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

§ 119. When negotiation not impaired by fraud, mistake or duress. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the docu-

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ment was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

§ 120. Attachment or levy upon goods for which a negotiable document has been issued. If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

§ 121. Creditors' remedies to reach negotiable document. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot be readily attached or levied upon by ordinary legal process.

§ 122. Seller must deliver and buyer accept goods. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

§ 123. Delivery and payment are concurrent conditions. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be reading and willing to pay the price in exchange for possession of the goods.

§ 124. Place, time and manner of delivery. 1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

2. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

3. Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

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5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

§ 125. Delivery of wrong quantity. 1. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

§ 126. Delivery in installments. 1. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

2. Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case where the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

§ 127. Delivery to a carrier on behalf of the buyer. 1. Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section one hundred, rule five, or unless a contrary intent appears.

2. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

3. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and,

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if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

§ 128. Right to examine the goods. 1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity to examine them for the purpose of ascertaining whether they are in conformity with the contract.

2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

3. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

§ 129. What constitutes acceptance. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

§ 130. Acceptance does not bar action for damages. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor.

§ 131. Buyer is not bound to return goods wrongly delivered. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

§ 132. Buyer's liability for failing to accept delivery. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

§ 133. Definition of unpaid seller. 1. The seller of goods is deemed to be an unpaid seller within the meaning of this article.

(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has

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been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

2. In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

§ 134. Remedies of an unpaid seller. 1. Subject to the provisions of this article, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such has

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of resale as limited by this article;

(d) A right to rescind the sale as limited by this article.

2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

§ 135. When right of lien may be exercised. 1. Subject to the provisions of this article, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

§ 136. Lien after part delivery. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

§ 137. When lien is lost. 1. The unpaid seller of goods loses his lien thereon

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

2. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

§ 138. Seller may stop goods on buyer's insolvency. Subject to the provisions of this article, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard

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to the goods as he would have had if he had never parted with the possession.

§ 139. When goods are in transit. 1. Goods are in transit within the meaning of section one hundred and thirty-eight,

(a) From the time they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

2. Goods are no longer in transit within the meaning of section one hundred and thirty-eight,

(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

3. If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer.

4. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

§ 140. Ways of exercising the right to stop. 1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller.

The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

§ 141. When and how resale may be made. 1. Where the goods are of a perishable nature, or where the seller expressly reserves the

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right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

2. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

3. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

4. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

5. The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

§ 142. When and how the seller may rescind the sale. 1. An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserves the right to do so in case the buyer should make default, or where the buyer has been seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for in default in the payment of the price an unreasonable time. The any loss occasioned by the breach of the contract of the sale.

2. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

§ 143. Effect of sale of goods subject to lien or stoppage in transitu. Subject to the provisions of this article, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

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§ 144. Action for the price. 1. Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

2. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section one hundred and forty-five are not applicable, the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

§ 145. Action for damages for nonacceptance of the goods. 1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for the acceptance, then at the time of the refusal to accept.

4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

§ 146. When seller may rescind contract or sale. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

§ 147. Action for converting or detaining goods. Where the property in the goods has passed to the buyer and the seller wrongfully

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neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

§ 148. Action for failing to deliver goods. 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

§ 149. Specific performance. Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

§ 150. Remedies for breach of warranty. 1. Where there is a breach of warranty by the seller, the buyer may, at his election,

(a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

2. When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

3. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

4. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or

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offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

5. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section one hundred and thirty-four.

6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

7. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

§ 151. Interest and special damages. Nothing in this article shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

§ 152. Variation of implied obligations. Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived, or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

§ 153. Rights may be enforced by action. Where any right, duty or liability is declared by this article, it may, unless otherwise by this article provided, be enforced by action.

§ 154. Rule for cases not provided for by this article. In any case not provided for in this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

§ 155. Provisions not applicable to mortgages. The provisions of this article relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge or other security.

§ 156. Definitions. 1. In this article, unless the context or subject-matter otherwise requires:

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a persons who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

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"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property."

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

2. A thing is done "in good faith" within the meaning of this article when it is in fact done honestly, whether it be done negligently or not.

3. A person is insolvent within the meaning of this articlie who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

4. Goods are in a "deliverable state" within the meaning of this article when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

§ 157. Article does not apply to existing sales or contracts to sell. None of the provisions of this article shall apply to any sale, or to any contract to sell, made prior to the taking effect of this article.

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§ 158. No repeal of the uniform warehouse receipt laws. Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the law to make uniform the law of warehouse receipts, or of the law, if enacted, to make uniform the law of bills of lading, or of section nine hundred and forty-three of chapter eighty-eight of the laws of nineteen hundred and nine, constituting chapter forty of the consolidated laws.

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Decision No. 1414.

SIEGELE v. DES MOINES MUTUAL HAIL INS. ASS'N.

(Supreme Court of South Dakota. October 3, 1911.)

132 N. W. 697.

ACCORD AND SATISFACTION — INSURANCE.

Loss having been sustained under a hail policy, the insurer claimed it was adjusted at $400, and the assured at $925. The company sent assured a check, which, with the balance due for premium, amounted to $400, reciting on its face, "This check accepted as payment in full for all claims to date." The assured cashed the check at his local bank, and in doing so wrote his name under an indorsement, "Accepted in part payment of loss by payee." Held that, since there was no consideration for the acceptance and cashing of the check, it would not amount to an accord and satisfaction; Civil Code, section 1180, providing that part performance of an obligation, when expressly accepted by the creditor in writing as satisfaction thereof without any new consideration, extinguishes the obligation, being inapplicable.

Loss having been suffered under a hail policy, two separate adjustment papers were made out; one, signed by the adjustor and left with the assured, adjusted the loss to the several fields of grain at a per cent. of total loss on each field; the other, signed by the assured and the adjuster, as to which assured claimed his signature had been secured by fraud, adjusted the total loss in a lump sum. Held that, in the absence of fraud on the part of the adjuster, the two papers executed at the same time should be construed together, and when so construed, it being apparent that the naming of the lump sum was at best a mistake, the amount of the loss as itemized, field by field, in the other should control.

Appeal from Circuit Court, Marshall County; Frank McNulty, Judge.

Action by William S. Siegele, as administrator of the estate of Christian Bauer, deceased, against the Des Moines Mutual Hail Insurance Association. Judgment for plaintiff, and defendant appeals. Affirmed.

Hall, Roddle & Purdy, for appellant. Theodore J. P. Giedt and James M. Brown, for respondent.

WHITING, J. This action was brought to recover a balance of $525 claimed to be due upon a hail insurance policy. Verdict and judgment were for plaintiff; a new trial was denied, and defendant

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appealed from such judgment and from the order denying a new trial.

The main question for discussion is whether or not there was an accord and satisfaction, barring the recovery of the $525. A dispute arose between the insurance company and the assured in relation to the adjustment that was made of the loss. No question arose but what the loss was adjusted by the assured, and an authorized adjuster sent by the company. The company claimed the loss was adjusted at $400, and the assured claimed that it was adjusted at $925. Under such circumstances, the company wrote the policy holder, and inclosed a check, which, with a balance due the company for premium, amounted to $400. The check recited on its face: "This check accepted as payment in full for all claims to date." The policy holder cashed this check at his local bank, and, in doing so, he indorsed same: "Accepted in part payment of loss by payee. Chris Bauer." The jury evidently found that the loss was adjusted at $925. It is unnecessary to review the testimony in full; it was ample to sustain such a finding.

The appellant contends that, by accepting and cashing the check conditioned as such check was, the policy holder satisfied the debt, whether it was $400 or $925. The respondent contends that, regardless of the condition attempted to be attached to the check, the payee had a right and the power to qualify his acceptance of the check, and receive same in part payment; and respondent further contends that, even if the check had been cashed without any attempt to qualify its acceptance, the acceptance and cashing of such check would not have amounted to an accord and satisfaction, as there was absolutely no consideration therefor. The respondent is clearly correct in this last contention, under the law as recently announced by this court, in the case of Hagen v. Townsend & White, 131 N. W. 512, wherein the facts were analogous to those in this case, unless section 1180 of the Revised Civil Code applies. Such section provides: "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation." This check was not "accepted in writing" in satisfaction of the disputed claim; as a matter of fact, the assured by his act refused to so accept same. His cashing of such check, without accepting same in full of his debt, may have been a wrongful conversion of the check; but it certainly was not an acceptance of $400 in satisfaction of the claim.

Appellant claims error, in that the court modified certain instructions asked for by appellant, which instructions related to the claimed defense of accord and satisfaction. From what we have said above, it is clear that appellant was not entitled to any instruction upon such defense, as the court should have instructed the jury that such defense had not been established. Appellant could not have been prejudiced by the modifications complained of.

Appellant also complains of emphasis which it claims the court, in its instructions, put upon the question of fraud, which fraud the assured had alleged was practiced by the adjuster in procuring his signature to an adjustment contract purporting to adjust the loss at

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the sum of $400. Without agreeing with appellant in its claim of undue emphasis of the question of fraud, we are of the opinion that, even if there was emphasis in this matter, appellant was not prejudiced thereby. Two separate adjustment papers appeared to have been made out; one, signed by the adjuster and left with assured, adjusted the loss to the several fields of grain at a per cent. of total loss on each field; the other, signed by assured and adjuster (assured claiming his signature to have been obtained by fraud), adjusted the total loss in a lump sum. If there were no fraud on the part of the adjuster, we think the two papers, executed as they were at the same time, should have been construed together, and when so construed it was very apparent that the naming of the lump sum, $400, in the one paper was, at best, a mistake, and the amount of loss as itemized, field by field, in the other paper should control.

The judgment was clearly correct, and it and the order denying a new trial are affirmed.

Decision No. 1415.

WORCESTER COLOR CO. v. HENRY WOOD'S SONS CO.

(Supreme Judicial Court of Massachusetts. Norfolk. May 19, 1911.)

95 N. E. 392.

ACCORD AND SATISFACTION — CORPORATIONS.

Whether a buyer, at the time of sending a check on which was written "in full to date," and whether the seller, on receiving and depositing the check, understood, or ought to have understood, as reasonable men, that the check was in accord and satisfaction of all outstanding claims between them, or whether the seller, on receiving the check, had a right to believe that it was sent in payment of a reduced bill for specified goods amounting to the exact amount of the check, held for the jury.

The acceptance and collection of a check, proffered on condition that it is in full settlement of all unliquidated claims, though accompanied by protestations that it is not so received, bars any attempt to collect the balance, and constitutes an accord and satisfaction.

Where plaintiff received defendant's check, on which was written the words "in full to date," plaintiff's erasure of such words before depositing the check was unauthorized, and did not affect the question whether its proffer and acceptance constituted an accord and satisfaction.

The acceptance and deposit of a check, on which is written the words "in full to date," or an equivalent phrase, does not constitute an accord and satisfaction of a controverted claim as a matter of law.

Mass. St. 1907, c. 290, effective April 13, 1907, relating to the dissolution of certain corporations, provided (section 2) that nothing in the act should affect any suit pending by or against any corporation mentioned in the first section thereof. Held, that the word "suit," as used in such section, included every proceeding in a court of justice by which a person might pursue a remedy afforded by law, including an action at law, and that the word "pending" was descriptive of the action from the date of the writ, so that, the writ in a suit by a corporation having been dated

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April 9, 1907, the suit was pending, and was not abated by the dissolution of the corporation under such act, notwithstanding the reference in section 1, to St. 1903 of Massachusetts, c. 437, §§ 52, 53, continuing the corporate existence of dissolved corporations, for three years only, to prosecute and defend suits.

Exceptions from Superior Court, Norfolk County.

Action by the Worcester Color Company against the Henry Wood's Sons Company. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Spaulding & Lewis and P. M. Lewis, for plaintiff. H. S. Davis, for defendant.

RUGG, J. This is an action of contract to recover for two bills of merchandise. There is no controversy between the parties that the goods were sold and delivered and the prices charged were fair. The only defense is that there has been an accord and satisfaction. The course of dealings between the parties was this: On March 19, 1906, the defendant ordered of the plaintiff six barrels of Milori blue, and on March 21, 1906, 226 pounds of Chinese blue, which were shipped on these days respectively. On March 28, 1906, a written contract was made by which certain machinery and other chattels were sold by the plaintiff to the defendant for $5,000 to be paid in instalments. On the same date but by a separate transaction the defendant agreed to buy of the plaintiff a lot of pulp blue. The pulp blue was invoiced and shipped on April 16, 1906, in three different items, the prices charged aggregating $532.07. Thereafter the defendant claimed that the shipments of March 19th and 21st were included in the contract of March 28th, and that the $5,000 therein stipulated was to pay for the earlier sales. It further claimed that the pulp blue was larger in quantity and poorer in quality than had been represented, while the plaintiff asserted that it corresponded with the representation both as to quality and quantity. There were communications between representatives of the plaintiff and defendant touching these matters. Ultimately the defendant paid the $5,000 called for by the written contract of March 28, 1906, but did not pay for the invoiced goods. On December 24, 1906, the plaintiff sent the defendant a corrected bill for the pulp blue, reducing it by $210.76, and making the total $321.31, together with a letter explaining that the reduction was made in accordance with a letter of May 1, 1906, from plaintiff to defendant, in which it was stated that the reduction in price was made "with the understanding that all other payments for material will be paid for according to invoices and contracts." On January 11, 1907, the plaintiff wrote the defendant again asking for a remittance. The defendant made no reply to either of these communications until March 13, 1907, when it returned the corrected bill for the pulp blue invoice of April 16, 1906, showing the amount due to be $321.31, together with a check for that sum, on which was written "in full to date" and a letter saying: "Enclosed please find check for your account in full, $321.31." The letter did not refer specifically to the invoices of March 19 and 21, 1906. Thereupon the president of the plaintiff, after consultation with his attorney, drew a pen through the words upon the

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check, "in full to date," collected it in ordinary course and sent the receipted bill to the defendant with a letter in which he said that the check was in settlement of the April 16, 1906, invoice and was not in full for all claims, and asking remittance for the items here in litigation.

In this posture of the evidence, the presiding justice instructed the jury as matter of law that the sales of March 19 and 21, 1906, being the subject of this action, were not included in the written agreement of sale of March 28, 1906. This was plainly right, and it is not now contended otherwise by the defendant. He further ruled in substance that the defendant was honest in its claim that the goods here sued for were included in the written contract of March 28th. Unless this was assented to by both parties, it was too favorable to the defendant, for whether the dispute was genuine or not, especially in view of the correct ruling of law that they were not so included, was a question of fact, which was for the jury unless by agreement there was no issue about it. He also left it to the jury to say whether there had been an accord and satisfaction. He ruled that it was a question of fact to be decided upon the testimony, correspondence, and all the circumstances, whether the defendant at the time the check was sent and the plaintiff at the time it was received and deposited understood or ought to have understood as reasonable men that it was an accord and satisfaction of all outstanding claims between them, and that if the defendant made known to the plaintiff that the payment was on the condition that it should be received in full satisfaction of both its claims against the defendant, or if the plaintiff ought reasonably to have understood that this check was sent to be used only upon that condition, the plaintiff having accepted it, could not recover. The language of the letter of the defendant which transmitted the check and the words written upon the check in the light of all the transactions between the parties was not so plain and unequivocal as to warrant a ruling of law that any rational person ought to have understood that they meant an offer of the check upon condition that if accepted it would be in full settlement of all disputed claims. There had been two subjects of controversy between the parties: One was whether the invoices of March 19th and 21st were included in the written contract of March 28th for an entire price. About this the parties were wholly at variance, and there had been no suggestion of compromise, each having endeavored by correspondence to convince the other of its error. This disagreement was about the construction of the terms of a written contract and was a question of law. The other controversy related to the price which should be charged for some pulp blue. This controversy did not relate to liability, for the defendant admitted its liability, but to the amount for which it was liable and was wholly a question of fact. The defendant asserted its readiness to pay this account when a corrected bill was sent to it. After such a bill had been sent, the defendant returned it to the plaintiff with the check which was for the precise amount of this bill, together with the letter, which did not refer in terms to any other matter than the bill. There is much to be said in support of the contention that the fair inference from the use of the words "for your account in full" in the defendant's letter and "in full to date" on the check, read in

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the light of the previous relations of the parties and of the fact that settlement for the pulp blue alone was inclosed referred only to the pulp blue account. It was at least susceptible of this construction.

But it is strongly urged that the action of the president of the plaintiff and his letter acknowledging the check show clearly that he understood it to be tendered by the defendant upon condition that it was in full satisfaction of all outstanding claims, and that by acceptance and collection of it the plaintiff became bound to the condition upon which it was offered. The proposition that the acceptance and collection of a check, proffered upon condition that it is in full settlement of an unliquidated claim, even though accompanied by protestations that it is not so received, bars any attempt to collect the balance, is supported by the great weight of authority. See Seeds, Hay & Grain Co. v. Conger, 83 Ohio, —, 93 N. E. 892, and cases collected in 1 Enc. L. & P. 629 et seq. But see, also, 17 Harv. L. Rev. 459–469, and Day v. McLea, 22 Q. B. D. 610. The letter and testimony of the plaintiff's manager does not go so far as to amount to an admission as matter of law that he came within this principle. It may be assumed that his erasure of the words "in full to date" from the check was unauthorized and did not affect the rights of the defendant. Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; Gribble v. Raymond Van Praag Supply Co., 124 App. Div. 829, 109 N. Y. Supp. 242; Hussey v. Crass (Tenn. Ch.), 53 S. W. 986. His words and actions are capable of the construction that he understood that the check was in full only of the therefore disputed pulp blue account, inasmuch as it was for the exact amount of the bill for those goods with which alone it was inclosed, and that he was cautiously guarding against any possible misconstruction which might be attached to the situation later.

It is not every use of the words "in full to date" or equivalent phrase which constitutes an accord and satisfaction in connection with the payment of a controverted claim. Many cases have arisen where the conditions have been such as make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has been made. This case falls within that class.[1]

It is rarely that a court can rule as matter of law that a burden of proof, depending upon inferences from circumstances and oral testimony has been made out. Usually a question of fact is presented. Here the defendant was bound to make out its defense of accord and satisfaction, and it cannot be said that the jury had no right to find that the president of the plaintiff, when he received the defendant's check and letter, understood that it was sent for the pulp blue bill, which accompanied it and which was much smaller than at first

[1] Laroe v. Sugar Loaf Dairy Co., 180 N. Y. 367, 73 N. E. 61; Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289–299, 51 N. E. 986; Krauser v. McCurdy, 174 Pa. 174, 34 Atl. 518; Mortlock v. Williams, 76 Mich. 568, 43 N. W. 592; Rosenfield v. Fortier, 94 Mich. 29–34, 53 N. W. 930, 54 N. W. 640; Louisville, New Albany & Chicago Ry. Co. v. Helm, 22 Ky. Law Rep. 964, 59 S. W. 323, 109 Ky. 388; Rapp v. Giddings, 4 S. Dak. 492, 57 N. W. 237; McKay v. Myers, 168 Mass. 312, 47 N. E. 98; Nathan v. Ogdens, 93 L. T. N. S. 553, s. c. 94 L. T. N. S. 127.

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claimed. In the opinion of a majority of the court the defendant's requests for instructions, so far as not given in substance, were rightly refused, and the charge was sufficiently favorable to it upon this branch of the case.

After the verdict which was returned on January 18, 1910, and after the filing of the bill of exceptions, but before it was allowed, the defendant filed a motion to dismiss the action on the ground that the plaintiff corporation was dissolved by St. 1907, c. 290, which took effect on April 13, 1907. Section 2 of this act provided that "nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section of this act." "Suit" is used in this statute as a comprehensive word "to apply to every proceeding in a court of justice by which a person pursues that remedy which the law affords" and includes an action at law. Kohl v. U. S., 91 U. S. 367–375, 23 L. Ed. 449. See Boston v. Turner, 201 Mass. 190–196, 87 N. E. 634. This writ was dated on April 9, 1907, and this action was therefore commenced before the statute went into effect. It was pending within the meaning of that word in section 2. Although in some connections "pending" is not properly descriptive of an action until it is entered in court (Com. v. Churchill, 5 Mass. 174, 180; Federhen v. Smith, 3 Allen, 119), commonly an action is pending from the date of the writ. The effect of the language quoted from section 2 was to keep alive any suit then pending, notwithstanding the reference in section 1 to St. 1903, c. 437, §§ 52, 53, which continues the corporate existence of dissolved corporations for three years only (inter alia) for the purpose of prosecuting and defending suits. Hence Thornton v. Marginal Freight Ry., 123 Mass, 32, does not govern. Pomeroy's Lessee v. Bank, 1 Wall. 23, 17 L. Ed. 500; Taylor v. Bowker, 111 U. S. 110–116, 4 Sup. Ct. 397, 28 L. Ed. 368.

Exceptions overruled.

Decision No. 1416.

HARDEN v. BIRMINGHAM TRUST & SAVINGS BANK.

(Appellate Court of Alabama. June 8, 1911.)

55 So. 943.

BANKS AND BANKING — FUNCTIONS — PAYMENT OF CHECKS.

A bank's failure to pay a check of a depositor drawn in favor of another does not render it liable, unless the check was presented at the proper time and place, properly indorsed, and, if transferred by the payee, properly indorsed by the transferee.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by N. J. Harden against the Birmingham Trust & Savings Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

Allen & Bell, for appellant. Tillman, Bradley & Morrow and M. M. Baldwin, for appellee.

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PER CURIAM. The complaint as originally filed contained one count, and two others were subsequently added by way of amendment. The first two counts were in case for a breach of duty arising out of contract, and claiming special damages on account of the alleged tort. The third count is for breach of contract simply, and hence is in assumpsit.

In order to fix a liability, as for breach of duty, on a bank for a failure to pay a check of a depositor drawn in favor of another person, it must appear that the check was presented at the proper time and place, and properly indorsed by the payee, and, if it has been transferred by the payee to another, then it should be indorsed by such other person also. First National Bank v. Nelson, 105 Ala. 180, 16 South. 707; Am. & Eng. Ency. of Law, vol. 5, p. 1014 et seq.; Randolph on Com. Paper, § 787. These facts must be averred and proven to authorize a recovery in action brought in such case.

The first and second counts, as originally filed and as last amended, each fail to aver or show that the check was properly indorsed by the person presenting the same for payment. It is true that as last amended it is alleged that the check was duly indorsed by the payee, but it is not shown by the allegations of the count that the indorsement was in blank, or that the check was presented for payment by the payee. The count is left open to inference that some other person than the payee presented the check for payment, and it is not shown that the check was at the time of presentation for payment indorsed by such subsequent holder. In this respect the counts were wanting in proper averment, and the demurrer taking the point was properly sustained.

As we have seen, the first and second counts were in case, and the third in assumpsit. Prior to the adoption of the present Code, case and assumpsit could not be joined in the same suit. The present action was commenced prior to the adoption of the present Code. The third count was introduced, by way of amendment, subsequent to the Code's adoption. The amendment related back to the commencement of the suit, and upon the question of a misjoinder in pleading is to be considered as of the time of the filing of the original complaint. Section 5367 of the Code 1907, relating to amendments, among other things, provides as follows: . . . Or by striking out or adding new counts or statements on the cause of action, which could have been included in the original complaint or plea, and such amendment shall relate back to the commencement of the suit," etc. It is plain that the third count, which is in assumpsit, could not have been included in the original complaint with count 1, which was in case, at the time of the filing of the complaint. Motion was made to strike the third count on grounds of departure and misjoinder, which was sustained. It is insisted by appellant that by demurrer, and not by motion to strike, was the proper way to raise the objection, and that therefore the court erred in sustaining the motion.

It has been heretofore ruled by the Supreme Court that motion to strike in such cases is the proper remedy. Turner v. Roundtree, 30 Ala. 706; Springfield Co. v. Dejarnette, 111 Ala. 248–256, 19 So. 995; Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517.

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We find no error in the rulings of the court, and the judgment must be affirmed Our view and conclusion render it unnecessary to consider other questions discussed by counsel.

Affirmed.

NOTE. — The foregoing opinion was prepared by Chief Justice Dowdell, of the Supreme Court, before the transfer of the case to this court, and was adopted by this court.

Decision No. 1417.

S. WEISBERGER CO. v. BARBERTON SAVINGS BANK CO.

(Supreme Court of Ohio. March 28, 1911.)

95 N. E. 379.

BANKS AND BANKING.

W., being indebted to R., whose place of business W. knew to be 48 Walker street, New York city, drew a check on his local bank of deposit in favor of R. for the amount of the debt, without designating therein his place of business, and inclosed the check with a letter in an envelope which he through mistake addressed to R., 48 Walker street, Cleveland, Ohio, and caused the envelope and contents so addressed to be mailed in the usual way, and it arrived in Cleveland in due course of mail, where the letter carrier found no one of that name on Walker street of that city, but found a man whose name was R. on Henry street, and to whom the carrier delivered the letter. He opened it and took possession of the check, and by indorsing the name R. on the back thereof obtained the cash from an acquaintance, who indorsed and deposited said check in his bank of deposit in Cleveland. The latter bank indorsed it over to another bank in the same city, guaranteeing prior indorsements, and this bank indorsed it payable to any bank or bearer, guaranteeing all prior indorsements, and in this condition it was presented to the drawee bank, and by it paid and charged to W.'s account, it having no knowledge of said mistake in addressing the letter. W. afterwards discharged his debt to the New York creditor by other means, and brings suit against the drawee bank to recover the amount of the check so charged to his account.

Held, the drawer of the check was first in fault, and as his negligence contributed directly to its wrongful and fraudulent appropriation, he is not entitled to recover.

(Syllabus by the Court.)

Error to Circuit Court, Summit County.

Action by the S. Weisberger Company against the Barberton Savings Bank Company. Judgment for defendant was affirmed by the Circuit Court, and plaintiff brings error. Affirmed.

The parties to this case are corporations doing business in the village of Barberton, Summit county, Ohio; the plaintiff in error being engaged in mercantile business, and the defendant in error engaged in a general banking business. The former brought suit against the latter, and for cause of action alleged in substance: That on or about January 13, 1906, and prior thereto, it had deposited with the said

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bank an amount of mony in excess of $122.13, which sum was on deposit on said day subject to check in excess of any liability or claim against the same. That on that day the plaintiff drew a check upon the bank for the sum of $122.13, payable to Max Roth of New York city. That said check so drawn was fraudulently indorsed in blank by a person purporting to be Max Roth of Cleveland, Ohio, and that said check so fraudulently indorsed was delivered to one B. Schoenfeld, and by him indorsed in blank and deposited with the Cleveland Trust Company, of Cleveland, Ohio, and by the latter said check was indorsed with the following indorsements: "Pay to the Union National Bank of Cleveland, or order; prior indorsements guaranteed. The Cleveland Trust Co., Perry Office, C. O. Patch, Secy.-Treas." The said check was further indorsed by the Union National Bank of Cleveland, as follows: "Pay to the order of any bank or bearer; all prior indorsements guaranteed. Jan. 10, 1906. Union National Bank, Cleveland, Ohio, E. R. Fancher, Cashier." It is alleged that said check, with the forged indorsement thereon of Max Roth, and with the other indorsements thereon as stated, was wrongfully accepted and paid by the defendant bank, at Barberton, on or about the 23d day of January, 1906, and afterwards was wrongfully and without authority from the plaintiff charged against its account with said defendant bank. It is alleged that when plaintiff discovered the forged indorsement and the wrongful payment aforesaid, and on or about February 7, 1906, plaintiff demanded that defendant correct said account,, and not charge said check against its account, which defendant refused to do, and refused to pay the plaintiff the amount of the check so wrongfully paid, and it prays judgment for the amount.

The answer admits most of the allegations made in the petition, but denies that said check was made payable to Max Roth, of New York city. The answer avers that said check was indorsed by Max Roth, and by the said Max Roth delivered to one B. Schoenfeld, and by him was indorsed in blank and deposited with the Cleveland Trust Company, of Cleveland, Ohio, and that this trust company indorsed the check to Union National Bank of Cleveland, or order, and it indorsed the same payable to the order of any bank or bearer, on the day and in the form alleged in the petition. The Union National Bank presented the check so indorsed to the defendant bank, at Barberton, for payment, and it paid the same and charged it to plaintiff's account. The defendant further alleges that said check was paid to Max Roth, of Cleveland, Ohio, without any information or knowledge to show that it was paid to any one else, and that, if said plaintiff has been damaged, it occurred by reason of its own negligence in misdirecting said check and mailing the same to Max Roth, at Cleveland, Ohio, instead of Max Roth of New York city. It is then averred that plaintiff did not act promptly when it discovered its mistake and inform defendant in time to protect itself against any fraud committed.

The new matter of the answer is denied by reply. The parties waived a jury and submitted the case on the facts to the court, who found for the defendant. A judgment on the finding was affirmed by the Circuit Court. Error is prosecuted here to reverse both judgments.

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Musser, Kimber & Huffman, for plaintiff in error. J. A. Koehler, Arthur S. Mottinger, and Charles E. Smoyer, for defendant in error.

PRICE, J. (after stating the facts as above). At the trial in the Court of Common Pleas, some of the facts were agreed upon, and they show that, at the date of the check mentioned in the petition, the plaintiff in error was indebted to one Max Roth, of New York city, in the sum of $122.13, and that his place of business at that time was No. 48 Walker street of that city. To pay the above indebtedness, the plaintiff in error, on the 13th day of January, 1906, drew its check for said amount, on the defendant in error, in favor of and payable to Max Roth, in the following words:

"Barberton, O., 1—13, 1906. Pay to the order of Max Roth ($122.13/100) one hundred twenty-two 13/100 dollars. The S. Weisberger Co. To the Barberton Savings Bank, Barberton, Ohio."

This check, with a letter signed by the firm, was placed in an envelope, which was addressed to Max Roth, 48 Walker street, Cleveland, Ohio, instead of Max Roth, 48 Walker street, New York city. The letter, so addressed and containing the check, shortly after it had been mailed to Cleveland, was delivered by the post-office authorities to one claiming to be Max Roth, who lived or roomed on Henry street in the city of Cleveland. It appears that his name was Max Roth, but not the Max Roth to whom plaintiff was indebted, and whose place of business was 48 Walker street, New York city. The Cleveland Max Roth, to whom the letter containing the check was delivered, took the check to a saloonkeeper in Cleveland, with whom he was acquainted, and after indorsing his name, Max Roth, on the back of the check, received the cash for the same from the saloonkeeper, whose name is B. Schoenfeld. The latter indorsed and delivered it to the Cleveland Trust Company, which later indorsed and deposited it with the Union National Bank of that city, by which the check was presented to defendant bank for payment, and it was paid and charged to the account of the plaintiff. It never reached the Max Roth of New York for whom it was intended, and plaintiff, afterwards and by means of another check, discharged its indebtedness to the New York creditor. As between the parties hereto, who should bear the loss sustained?

It is not necessary that we consider the many authorities presented by the plaintiff in error concerning the liability of a bank to one of its depositors for paying a forged check, nor to discuss the general rule that such bank is bound to know the signature of its depositor. Those authorities may be regarded as sound on the facts of each case there found, and still the judgment of the lower court be free from error. There is one view of this case sufficiently clear to sustain the judgment, without conflict with any authority cited in the brief or oral argument. It stands out boldly in the plaintiff's case — in its petition and in its evidence — that it was first at fault, if not first and solely negligent. It was a business concern, keeping an account with the defendant bank. It knew that its creditor, Max Roth, resided in New York city, doing business at 48 Walker street, and, desiring to pay

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its debt to him, drew the check payable to him, not designating therein either the place of residence or business, and thoughtlessly or negligently inclosed it with a letter in an envelope which it addressed to Max Roth, 48 Walker street, Cleveland, Ohio, and, so addressed, the plaintiff caused it to be mailed. Bearing that address, the letter could not properly go to New York city, but could and properly did go to the city of Cleveland. Perhaps there is no Walker street in Cleveland; but the postal service, after diligent effort, found a Max Roth, or a man who claimed to be of that name, and the letter containing the check was delivered to him. Up to this point of time, no one connected with the check was negligent, except the plaintiff, unless it be the letter carrier who delivered the letter. The act of Max Roth of Cleveland, who received the letter, was criminal, and he forged the name of the real party for whom the check was intended by indorsing his name thereon.

The carelessness of the plaintiff put it within the power of the Cleveland man to perpetrate a fraud and obtain the proceeds of the check, which he did at the hands of Schoenfeld, his acquaintance. Then it took the customary course on its way to the bank of defendant, upon which it was drawn. Schoenfeld, believing the indorsement of the Cleveland acquaintance legitimate, deposited the check in his bank of deposit, having indorsed his name on the back thereof. This bank indorsed and transferred it to the Union National Bank, guaranteeing prior indorsements; and it in turn indorsed it payable to any bank or bearer, guaranteeing all prior indorsements. These were Cleveland banks, which made the indorsements and transfers; but it is not alleged in the petition that the defendant bank had any information or knowledge as to the residence or place of business of Max Roth, the plaintiff's creditor, and therefore the location of these indorsing banks was not calculated to put the defendant on inquiry or excite its suspicion. They had severally guaranteed prior indorsements. It was not practicable for the defendant to interview Max Roth, to ascertain whether he was the lawful holder of the check. While it is true that a forged indorsement transfers no title to the check, we cannot avoid a comparison of the negligent conduct of the plaintiff with the apparent good faith of the defendant, acting as it did under the circumstances narrated. The misdirected letter was the source of possibilities that became realities in this case. In other words, the plaintiff was first at fault, and its mistake made possible what in fact has transpired. If we admit, as we do, the ordinary rule that a bank is bound to know the signature of its depositor, it is a rule to protect the rights of the depositor. But where his carelessness has contributed directly to the deception of the bank, he may not be in position to enforce such general rule.

In the case at bar, it appears that neither the depositor nor the bank intended to commit any wrong, and we may apply a rule the substance of which is that, where one or two innocent parties must suffer because of a fraud or forgery, justice imposes the burden upon him who is first at fault and put in operation the power which resulted in the fraud or forgery. We decide this case on its own peculiar facts, and make no search for or examination of reported cases, and affirm the judgment of the lower court.

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We decide this case on its own peculiar facts, and make no search for or examination of reported cases, and affirm the judgment of the lower court.[2]

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

Decision No. 1418.

WALKER v. LOVITT.

(Supreme Court of Illinois. June 20, 1911.)

95 N. E. 631.

CONTRACTS — WHAT LAW GOVERNS — PAYMENT — USURY.

The construction and obligation of a contract must be determined by the law of the place where it is made or is to be performed.

Where a contract for the payment of money is silent on the subject, the place of payment is the place where the contract is made; the debtor being required to seek the creditor at his domicile or place of business.

The place where a contract is made depends not on the place where it is actually written, signed, and dated, but on the place where it is delivered.

Hurd's Rev. St. Ill. 1909, c. 74, § 8, provides that when any written contract, wherever payable, shall be made in Illinois or between citizens or corporations of that State, or a citizen or corporation thereof and a citizen or corporation of any other State, or shall be secured by a mortgage or trust deed on land in the State, such contract may bear any rate of interest allowed by law in Illinois, not exceeding seven per cent. per annum, and, if any person or corporation shall contract to receive a greater rate of interest than seven per cent. on any such contract, he shall forfeit the whole of such interest, and only be entitled to recover the principal. Held, that such section applies only to cases where the rate of interest that may be charged by the law of the State or country where the contract has been made is less than the rate that may be legally charged in Illinois in order to sustain its constitutionality, and hence did not apply to or render illegal a Missouri contract for the payment of money bearing eight per cent. interest which was not usurious in Missouri, and this notwithstanding the fact that its performance was secured by a mortgage on Illinois land; the mortgage being a mere incident to the agreement.

Where plaintiff sued on a note made and payable in Missouri, and defendant pleaded that the contract was usurious, the burden was on defendant to show that the contract was unlawful, and plaintiff was not bound to plead the Missouri interest statute in order to authorize its admissibility.

Appeal from Circuit Court, Pike County; Harry Higbee, Judge.

Action by A. M. Walker against William P. Lovitt. Judgment for plaintiff for less than the relief demanded, and he appeals. Reversed and remanded.

Anderson & Matthews, for appellant. W. E. Williams and A. Clay Williams, for appellee.

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DUNN, J. To an action on a promissory note the appellee set up the defense of usury as to all except a certain amount which was tendered to the plaintiff. The note on its face bore eight per cent. interest, to be compounded annually if not paid annually. The note was dated Louisiana, Mo., and was payable generally. The payee was a citizen and resident of Missouri, and the appellee a citizen and resident of Illinois. The rate of interest was lawful in Missouri. The note was secured by a mortgage on real estate in Illinois, and the appellee contends that, by virtue of section 8 of chapter 74 of Hurd's Statutes of 1909, the interest contracted to be paid was forfeited. The Circuit Court sustained this contention, and the plaintiff has appealed from the judgment directly to this court on the ground that the constitutionality of the section mentioned is involved. That section is as follows: "When any written contract, wherever payable, shall be made in this State, or between citizens or corporations of this State, or a citizen or corporation of this State, and a citizen or corporation of any other State, Territory or country (or shall be secured by mortgage or trust deed on lands in this State), such contract may bear any rate of interest allowed by law, to be taken or contracted for by persons or corporations in this State or which is or which may be allowed by law on any contract for money due or owing in this State: Provided, however, that such rate of interest shall not exceed seven per cent. per annum. And if any such person or corporation shall contract to receive a greater rate of interest or discount than seven per cent. upon any such contract, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation." If the note was an Illinois contract, it was usurious on its face without reference to this section. If it was a Missouri contract it was enforceable in this State according to the stipulated rate, though in excess of the rate allowed by our law, unless the interest was forfeited by the application of this section. Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Smith v. Whitaker, 23 Ill. 367; Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837; Dearlove v. Edwards, 166 Ill. 619, 46 N. E. 1081. The question of the application of the section was preserved by propositions of law submitted to the court.

The rule is well settled that the validity, construction, and obligation of a contract must be determined by the law of the place where it is made or is to be performed. The law of the place becomes a part of the contract, and the courts of another jurisdiction will enforce it in accordance with its legal effect where made or to be performed. Evans v. Anderson, 78 Ill. 558; Barnes v. Whitaker, 22 Ill. 606; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525; Roundtree v. Baker, 52 Ill. 241, 4 Am. Rep. 597; Coats v. Chicago, Rock Island & Pacific Railway Co., 239 Ill. 154, 87 N. E. 929.

When a contract for the payment of money is silent on the subject, the place of payment is presumed to be the place of making, and the debtor must seek the creditor at his domicil or place of business. Esmay v. Gorton, 18 Ill. 483; De Wolf v. Johnson, 10 Wheat. 367, 6 L. Ed. 343.

The place where a contract is made depends, not upon the

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place where it is actually written, signed, or dated, but upon the place where it is delivered, as consummating the bargain. Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76. The note here was delivered by the agent of the appellee to the payee at her residence in Louisiana, Mo., and she then delivered to such agent a check for the face of the note. The contract was thus consummated in Missouri, and the note then took effect as the appellee's obligation to repay the money there where he had borrowed it. The disposition the appellee's agent may afterward have made of the money cannot affect the rights of the parties to the note.

The substance of section 8 above mentioned, omitting the clause referring to security on lands in this State, first appeared in our statutes in 1857. The conventional rate of interest in this State was then ten per cent., which was higher than the rate permissible in other States and countries from whose citizens and corporations the citizens of this State were accustomed to borrow money, secured by mortgages on land in this State. Under the laws of these other States and countries various results followed a usurious contract, ranging from a forfeiture of the excess of interest to the complete avoidance of the contract. Where a contract or loan was made in this State, or between citizens of this State and citizens of such foreign State, and performance or payment was to be made in such foreign State, the contract or loan was governed by the law of such foreign State, and was valid or invalid as and to the extent determined by such foreign law. McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Adams v. Robertson, 37 Ill. 45; Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61. Thus a note given in New York by a citizen of this State and payable there bearing interest at a rate in excess of seven per cent. was void, because so declared by the law of New York, though in Illinois it was competent to contract for ten per cent. To meet this situation and enable citizens of this State to borrow money in other States whose usury laws were more stringent, and to give obligations and security for loans so made that should be legally binding and enforceable here against the borrowers and their property though not enforceable where made, the General Assembly passed two acts. One, which went into effect February 12, 1857, provided that when any contract or loan should be made in this State or between citizens of this State and any other State of country, bearing interest at a rate lawful in this State, it should be lawful to make the principal and interest of such contract or loan payable in any other State or Territory of the United States or in the city of London, in England, and in all such cases the contract or loan should be governed by the laws of this State and not affected by the laws of the State or country where the same should be made payable, and that no contract or loan theretofore made bearing interest at a rate lawful in this State when such contract was made, should be invalidated or in any wise impaired or affected by reason of the same having been made payable in any other State or country. Laws 1857, p. 38. At the same session "An Act for the encouragement and security of loans of money" was passed, which went into effect February 16, 1857, and provided that it should be lawful for any person or corporation borrowing money in this State to make notes, bonds, mortgages, and other securities for the payment

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of principal or interest at the rate authorized by the laws of this State payable at any place where the parties might agree, though the legal rate of interest in such place might be less than in this State, and such securities should not be held to be usurious or invalidated because of the rate of interest at the place where the paper should be made payable being less than in this State or because of any usury or penal law in such place. It was further provided that no plea of usury or defense founded upon an allegation of usury should be sustained in any court of the State nor any security held invalid on an allegation of usury, where the rate of interest did not exceed that allowed by the laws of this State, because of such security being payable at a place where such rate of interest was not allowed. Laws 1857, p. 33.

It was not the object of these acts to restrict the power of the citizen to contract for the payment of interest. They were enabling acts, and were intended to encourage the lending of money in the State by enabling its citizens to make a valid contract to repay the money in the State where it was borrowed, even though it was recognized that the contract would be void in that State. Their effect and intention was not to make void any contract which would be valid under the law of a foreign State, but to make valid against citizens of Illinois, and their property, contracts which under the law of the State where made would be void. They were therefore open to no constitutional objection. In Fowler v. Equitable Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786, they were enforced by the Supreme Court of the United States in a case where it was sought to interpose the defense that the contract of loan was a New York contract payable in New York and was void under the usury laws of that State.

In the Revision of 1874 these two statutes were repealed and a single section was enacted on the subject, as follows: "When any bond, bill, draft, acceptance, mortgage or other contract, shall have been or shall be made in this State, or between citizens of this State, or a citizen of this State and any other State, Territory or country, bearing interest at a rate lawful by the laws of this State, may be made payable in any other State, Territory or country, such contracts shall be governed by the laws of this State." Rev. St. 1874, c. 74, § 8. In 1875 this section was amended so as to read precisely as it does now, except for immaterial verbal changes and the rate, which has since been reduced from ten to seven per cent. Laws 1875, p. 85. The object of the Legislature has always been the same — to enable citizens to borrow money outside the State at the highest rate permitted by law within the State, and to give valid obligations therefor, though such obligations may be invalid by the law of the State where made. The Legislature has power thus to make contracts otherwise invalid enforceable in this State, for in so doing it violates no constitutional limitation. If it is undertaken to invalidate legal contracts made in another State, the case is different. Such action would deny to the parties to the contract the equal protection of the laws and abridge their privileges as citizens of the United States, and deprive them, without due process of law, of the liberty of making contracts outside of the State in regard to their property. The Legislature of a State has no power to prohibit its citizens from making, beyond the limits of the State, contracts lawful in the place where they are made,

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even though such contracts may concern property within the State. Allgeyer v. State of Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. The validity of the contract here is in no way affected by the fact that its performance was secured by a mortgage of Illinois land. The mortgage was but an incident of the agreement. "The mere taking of foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money and the security given is but the means of securing what he has contracted for, which in the eye of the law is to pay where he borrows, unless another place of payment be expressly designated by the contract." De Wolf v. Johnson, supra; Coghlan v. South Carolina Railroad Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; Manhattan Life Ins. Co. v. Johnson, 188 N. Y. 108, 80 N. E. 658, 9 L. R. A. (N. S.) 1142; Lockwood v. Mitchell, 7 Ohio St. 387, 70 Am. Dec. 78. The section of the statute under consideration, without violating constitutional rights, can be applied only to cases where the rate of interest that may be charged by the law of the State or country where the contract is made is less than the rate than may lawfully be charged in this State.

A distinction is sought to be drawn by counsel for appellee between statutes which declare a usurious contract void and those which merely provide for a forfeiture of interest, but the difference is only one of degree, and not of kind. No more authority exists for taking from an individual the benefit of a part of his contract than for taking all.

It is also insisted that the appellant did not plead the Missouri statute in regard to interest and therefore it was not properly admitted in evidence. It was not necessary for the appellant to aver or prove the law of Missouri. The burden of proving usury was on the defendant relying upon it as a defense. The appellant claimed a recovery, not because of the law of Missouri, but upon the contract, and if that was unlawful the burden of showing it was on the appellee. Dearlove v. Edwards, supra; Smith v. Whitaker, supra.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Decision No. 1419.

MACKINTOSH v. GIBBS et al.

(Court of Errors and Appeals of New Jersey. June 19, 1911.)

80 Atl. 554.

BILLS AND NOTES — WHAT LAW GOVERNS — NEGOTIABILITY — ATTORNEY'S FEES.

Where a note, made in California, was transferred by indorsement in New Jersey, the liability of the indorsers is determined by the New Jersey law.

Unless an instrument is negotiable, action cannot be maintained on an indorsement for transfer.

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Where a note was made in California prior to Act April 4, 1902, and was transferred by indorsement in New Jersey after said enactment, its negotiability was not governed by said act, but by the pre-existing law, as section 195 of the act expresely declares that it does not apply to negotiable instruments made and delivered prior to the passage thereof.

A provision in a note that on default in payment of interest, payable semi-annually, the whole shall become due did not affect the negotiability of the note.

The negotiability of a note is not affected by a stipulation that, on suit or employment of an attorney to enforce it, an additional sum of six per cent. on principal and interest shall be paid as attorney's fees.

The contract of indorsers for transfer is that, if the note is presented for payment at the time and place of maturity, and payment demanded and refused, and proper notice given thereof, they will pay the note to the holder.

Notice to indorsers of dishonor, when sent by mail, may be placed in the post office on the day after dishonor, allowing a sufficient time after the commencement of business hours on that day for the preparation of notice.

Garrison, Voorhees, and Minturn, JJ., dissenting.

Error to Supreme Court.

Action by James H. Mackintosh, executor of Sarah F. Mackintosh, deceased, against Ella J. Gibbs and another. On a judgment of the Supreme Court (74 Atl. 708) reversing the judgment for defendants, defendants bring error. Affirmed.

Peter Backes, for plaintiffs in error. Patterson & Rhome, for defendant in error.

PITNEY, C. This action was brought against the indorsers of a promissory note, made in the State of California and payable there, and indorsed for value before maturity to the plaintiff's testatrix in the State of New Jersey. The facts are sufficiently set forth in the opinion of the Supreme Court.

We concur with that court in the view that the question of the liability of the defendants upon the note depends upon the effect that the law attributes to their act, and that such effect is to be determined by the law of the State of New Jersey, where the transfer of the note was made. Freese ads. Brownell, 35 N. J. Law 285, 288, 10 Am. Rep. 239; Oliphant v. Vannest, 58 N. J. Law 162, 33 Atl. 382; 7 Cyc. 836.

But the question whether the note in suit was negotiable according to the law of New Jersey is material, because of the effect that it has upon the contract of indorsement. The plaintiff's right of action, under the evidence herein, depends solely upon the existence of that peculiar liability on defendants' part which is assumed by the indorser of negotiable paper, so that, unless the instrument is negotiable, the action cannot be maintained. Building Society v. Leeds, 50 N. J. Law, 399, 18 Atl. 82, 5 L. R. A. 353.

The note is made payable two years after its date, with interest payable semi-annually, and contains a clause providing that upon any default in payment of the interest the whole principal and interest shall become immediately due and payable at the option of the holder, and an additional stipulation that should suit be commenced or attorney be employed to enforce payment of the note, an additional sum of

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six per cent. upon principal and accrued interest would be paid as attorney's fees in such suit.

The Supreme Court deemed that it was unnecessary to determine whether a promissory note in this form was negotiable by the law of this State prior to the year 1902, because, by section 2 of the Negotiable Instruments Act (P. L. 1902, p. 583), provisions of this character do not interfere with negotiability.

We are unable to concur in this view. The note in suit was made and delivered prior to the passage of the act. It is true that before it fell due, and, indeed, before it was indorsed by the defendants and transferred to the plaintiff's testatrix, the act went into effect. The statute was approved April 4, 1902, and took effect (under 3 Gen. Stat. 1895, p. 3195, pl. 37) on July 4th in the same year. But by section 195 it is expressly declared that: "The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof." If this section is construed (as the Supreme Court must have construed it), so that an indorsement made subsequent to July 4, 1902, would be subject to the provisions of the act, and the contract of the indorser governed accordingly, although the note was made and delivered as between the maker and payee prior to the passage of the act, and the contract of the maker and of any indorser who put his name upon the paper prior to the pasage of the act would be governed by the law as it stood before the act, we are confronted with this difficulty that the Legislature must have contemplated a transition period between the old law and the new, during which (with respect to instruments bearing date prior to the passage of the act and falling due after it took effect) parties dealing in commercial paper would have been left in doubt as to the law governing the responsibility of successive parties; perhaps required to apply one rule as to the first indorser, and another rule as to a subsequent indorser, and therefore put upon inquiry as to the respective dates of successive indorsements. We are not convinced that the Legislature intended to leave the mercantile business of the State, even temporarily, subject to such embarrassment. In our opinion, the plain and simple language of section 195 manifests the intent of the Legislature to leave entirely unaffected all negotiable instruments that were made and delivered as between the original parties prior to the passage of the act, thus remitting all inquiries concerning the rights and liabilities of indorsers and indorsees, as well as of makers and payees, to a single date, presumably evidenced by the date written upon the instrument. We must inquire, therefore, whether, apart from the Act of 1902, the instrument in question was negotiable by the law of New Jersey.

Our previous statute was the "Act concerning promissory notes," etc., approved March 27, 1874, (2 Gen. Stat. 1895, p. 2604), the first section of which traces its origin to the Act 3 & 4 Anne, c. 9, § 1. Under the latter statute it was long ago held in England that a note payable in installments was negotiable (Oridge v. Sherborne, 11 M. & W. 373), and that a condition that the whole amount should become immediately payable on default in the payment of a single installment did not destroy its negotiability. Carlon v. Kenealy, 12 M. & W. 139, 13 L. J. Exch. 64. The same rule obtains generally in this country. Chicago Railway Co. v. Merchant's Bank, 136 U. S. 268, 284, 10 Sup. Ct. 999, 34 L. Ed. 349; 1 Randf. Comm. Paper, § 12; 7 Cyc. 599.

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The effect of a provision for attorney's fees, to be added in the event of suit brought, has given rise to some difference of opinion, but the greater weight of authority, and also the better reasoning, as we think, is in favor of the negotiability of notes containing such a provision, which becomes effective only in case of default in payment of the note at maturity. The cases are collected in 1 Randf. Comm. Paper, §§ 805, 806, and in 7 Cyc. 584 et seq. See, also, 4 Am. & Eng. Encyc. Law (2d Ed.) 99.

[6] The note being negotiable, the engagement of defendants as indorsers was that, if it was presented for payment at the time and place of maturity and payment demanded and refused, and proper notice given to them of such demand and refusal, they would pay the note to the holder. Prior to the Negotiable Instruments Act, it was not necessary that a promisory note be presented by a notary public, nor was protest, strictly so called, necessary to fix the indorser's liability. (We, of course, do not intend to intimate that the Act of 1902 changed the law in this regard.) The statute (2 Gen. Stat. 1895, p. 2605, § 9) providing for the protest of notes by a notary public was not intended to make such a protest a condition precedent to liability of the indorser, but to supply a convenient means of proving demand and notice of dishonor by the certificate of the officer performing the service. Sussex Bank v. Baldwin, 17 N. J. Law, 487; Burk v. Shreve, 39 N. J. Law 214.

In the case before us, the finding of facts by the trial judge is to the effect that upon the date when the note fell due it was presented on behalf of Mrs. Mackintosh at the bank where payable, and its payment demanded and refused; and on the following day payment was again demanded and refused, and the note was then formally protested for nonpayment, and notice of such protest and demand was mailed to each of the defendants. It seems to us that this is equivalent to a finding that due notice of dishonor was mailed to the defendants on the day after the note fell due. Of course, the making of a second demand did not detract from the effect of the first demand and refusal. Nor do we think the judge's finding can reasonably be construed as meaning that the notice sent to the indorsers referred alone to the second demand and refusal.

As to the time of sending this notice, the established rule in this State, prior to the Act of 1902, was that notice of dishonor, when sent by mail, might be placed in the post office on the day after dishonor, allowing a sufficient time after the commencement of business hours on that day for the preparation of the notice (Sussex Bank v. Baldwin, 17 N. J. Law, 487; Burgess v. Vreeland, 24 N. J. Law, 71, 59 Am. Dec. 408), and such was the general rule. 7 Cyc. 1087. We deem the findings of the trial judge sufficient to import due demand and notice of dishonor.

Upon the question of effect of the proceedings that were had in California for the foreclosure of the mortgage given as security for the note in question, and the effect of the decree of distribution made in the California administration proceedings, we agree with the Supreme Court.

The result is that the judgment of that court should be affirmed.

GARRISON, VOORHEES, and MINTURN, JJ., dissenting.

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Decision No. 1420.

HOLLIDAY STATE BANK v. HOFFMAN.

(Supreme Court of Kansas. June 10, 1911.)

116 Pac. 239.

BILLS AND NOTES — NEGOTIABILITY.

A promissory note, otherwise negotiable, due six months after date, with interest from maturity until paid at the rate of six per cent. per annum, contained a recital that certain collateral security was attached thereto, the market value of which was stated to be $6,250, and contained in addition the following stipulation: "if, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver, when demanded, additional security to the satisfaction of said holder; otherwise this note shall mature at once." Held, that the instrument is non-negotiable (1) because it contains a promise to do an act in addition to the payment of money; (2) because the date when it is to become due is uncertain.

(Syllabus by the Court.)

Appeal from Court of Common Pleas, Wyandotte County.

Action by the Holliday State Bank against C. B. Hoffman. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Sutton & Sutton and R. W. McGrath, for appellant. E. H. Gamble, for appellee.

PORTER, J. The bank brought this action on a promissory note given by C. B. Hoffman to the Merchants' Refrigerating Company for shares of its capital stock. Hoffman admitted the execution of the note and alleged a total failure of consideration. On the trial he introduced evidence tending to show that the stock for which the note was given was valueless, and that he was induced to purchase the same by the false and fraudulent representations of J. E. Brady, president of and acting for the refrigerating company. The plaintiff introduced evidence tending to show that it purchased the note in due course, without notice of defenses. At the close of the evidence the court directed a verdict for the plaintiff for the amount of the note, with interest. The defendant appeals.

The case turns upon the question whether the note is negotiable. It reads as follows:

"$4,500.00. No. ..... Kansas City, Mo., Sept. 18th, 19... Due..... Six months.....after date for value received.....I promise to pay to the order of Merchants' Refrigerating Company, Kansas City, Missouri, ...forty five hundred and no/100.....dollars at the office of the Merchants' Refrigerating Company, Kansas City, Mo., with interest from maturity until paid at the rate of six per cent. per annum. To secure the payment of this note and of any and all other indebtedness which.....I.....now owe to the holder hereof, or may owe him at any time before the payment of this note.....I have hereto attached, as collateral security the following: Stock certificate No. 137 of the capital stock of the Merchants' Refrigerating Company, calling for 50 shares of the stock; par value $5,000. The above collateral has a market value of $6,250.00. If, in the judgment of the

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holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise this note shall mature at once. Any assignment or transfer of this note, or obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. And I hereby authorize the holder hereof on default of this note, or any part thereof, according to the terms hereof, to sell said collateral or any part thereof, at public or private sale and with or without notice, and by such sale the pledgor's right of redemption shall be extinguished. C. B. Hoffman."

The provisions of the negotiable instruments law, which it is claimed are applicable to the note, are as follows:

"An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

"The sum payable is a sum certain within the meaning of this act, although it is to be paid: (1) With interest; or (2) by stated installments; or (3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity.

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: (1) At a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

"An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: (1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal." Sections 5254, 5255, 5257, and 5258, Gen. Stat. 1909.

The defendant contends that under these provisions of the statute the note is nonnegotiable for three reasons: (1) It is not for a sum certain; (2) it is not due at a fixed or determinable future time; (3) it contains promises to do acts in addition to the payment of money.

If for any of the reasons suggested the note is nonnegotiable, the case should have gone to the jury on the evidence offered in support

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of the plea of a failure of consideration, and, on the other hand, if it be held negotiable it was error to direct a verdict in view of the defendant's evidence which tended to show that the bank was not a holder in due course. Although the failure to submit the issues of fact to the jury requires a reversal, it is necessary to determine the question of the negotiability of the note.

In our opinion the most serious objection to the form of the note, the particular provision which most clearly destroys the negotiable character of the instrument, is the agreement as to matters other than the payment of money. This is the stipulation by which the maker agrees to deliver, when demanded, additional collateral security to the satisfaction of the holder, in default of which the note shall mature at once. It would hardly be different if the note recited that it was secured by a chattel mortgage upon certain live stock, and contained an agreement that in case their value should depreciate, and the holder should deem the security insufficient, the maker would, on demand, execute and deliver to the holder a mortgage upon certain real estate for such amount as would satisfy the holder, and that otherwise the note should mature at once. Such an instrument would not be an unconditional promise to pay money, but would be a promise to do something in addition thereto, and would fall, as we think this instrument falls, within the principle settled by the case of Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313. There a note, otherwise negotiable in form, provided that the property in payment of which the note was given should remain the property of the payee, and in default of payment should be returned to the payee. The sole question involved was whether the instrument was a negotiable, promissory note. It was said in the opinion:

"The contract stated in this instrument is not simply a promise to pay money, but a stipulation concerning the title to property, and a promise in reference to the future disposition of such property. It is essential to the negotiability of paper that there is in it but the simple promise to pay money. You may not incorporate with such a promise stipulations and agreements as to other matters, and then say that the absolute promise to pay money lifts the contract into the region of negotiable paper. This is the general rule, and whatever exceptions there may be, this is not one." Citing 1 Daniel on Negotiable Instruments, § 59. "Now this instrument touches other matters and contains other stipulations and provisions than those respecting the payment of money. It is a contract in respect to the title to property. It is also a contract for the possession of property, and because of these additional stipulations it is something more than a simple promise to pay money. . . . There might as well be included in one agreement a contract for the lease of real estate, or the hiring of chattels, or the performance of labor with an absolute promise to pay a sum certain at a certain time, and then affirm that by reason of this absolute promise the entire contract is a negotiable instrument. This is not the law. Doubtless many of the rules respecting negotiable paper are purely arbitrary, but nevertheless they are well settled, and ought to be rigorously enforced. Among these rules is that of the unity of the contract, the singleness of the promise to pay, and we think no departure should be made from the spirit or letter of those rules." The doctrine

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of this case has been often approved. Lyon v. Martin, 31 Kan. 411, 413, 2 Pac. 790; Iron Woks v. Paddock, 37 Kan. 510, 15 Pac. 574; Gilmore v. Hirst, 56 Kan. 626, 629, 44 Pac. 603; De Hass v. Roberts (C. C.), 59 Fed. 853, 855; Lincoln Nat. Bank v. Perry, 66 Fed. 887, 894, 14 C. C. A. 273.

The negotiable instruments law, which is merely declaratory of the mercantile law on the subject, contains a provision which, as we construe it, makes the note in the instant case nonnegotiable. Section 5258 of the General Statutes of 1909 reads: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable." The section then enumerates certain things which are not to be regarded as falling within the inhibition. None of these exceptions cover such a promise as the one under consideration.

The note is nonnegotiable for the further reason that the same provision renders doubtful and uncertain the time at which it shall become due. If the maker shall fail when demanded to furnish additional security to the satisfaction of the holder, the note shall mature at once. It is argued that this is no different in principle from the provision that default in the payment of any installment shall accelerate the maturity of the note, and cases are cited in which we have held that a similar provision will not render the note nonnegotiable. See Clark v. Skeen, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337. The negotiable instruments law itself expressly declares that a negotiable instrument may contain provisions of this kind. Gen. Stat. 1909, §§ 5255, 5257. The distinction between such a stipulation and the one in question lies in the fact that in the one instance the maturity is accelerated by the default of the maker alone, and the default is to consist in his failure to pay money. Here the maturity of the note is to be accelerated by the failure of the maker to do something in addition to the payment of money, and both contingencies are made to depend upon something over which he has not the absolute control. It is within the power of the holder, by refusing assent to what the maker has done, arbitrarily to make the note due at any time between the date of its execution and six months thereafter. If the holder is not satisfied with the additional security, the note matures at once, and thus the time at which it may mature would depend upon the time at which the holder declared himself dissatisfied with the security delivered by the maker. The effect of this stipulation is to leave the time when payable uncertain and indefinite. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Brooks v. Hargreaves, 21 Mich. 254; Kimpton v. Studebaker Bros. Co., 14 Idaho 552, 94 Pac. 1039, 125 Am. St. Rep. 185; Savings Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Wisconsin Yearly Meeting v. Babler, 115 Wis. 289, 91 N. W. 678; Continental National Bank v. McGeoch and others, 73 Wis. 332, 41 N. W. 409. See, also, Iowa National Bank v. Carter, 144 Iowa 715, 123 N. W. 237.

The law of commercial paper, like all other substantive law, is the creature of growth. Founded on the custom and usages of merchants, it is the combined result of reason and experience slowly modified by the necessities and changes in commercial affairs. The methods of modern business and the interests of maker and holder alike require

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the deposit of collateral securities, with the power in the holder to sell the same at maturity. The oft-repeated epigram of Judge Gibson, in the opinion in Overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645, that "a negotiable bill or note is a courier without luggage" has lost much of its aptness since 1846. The note held nonnegotiable there contained a warrant of authority in the holder to confess judgment with a release of errors and waiver of appraisement and stay of execution. The statute (Negotiable Instruments Act) provides that an instrument otherwise negotiable is not affected by a provision which "(2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor." In former opinions this court has frequently refered to the conflict of authority in the decisions respecting the effect of collateral provisions of this character in promissory notes and bills of exchange. Lyon v. Martin, supra; Bank v. Gunter, 67 Kan. 227, 233, 72 Pac. 842. The adoption in recent years of the negotiable instruments law by so many of the States was in response to the general desire for uniformity in respect to commercial paper. The application, however, by the courts of legal principles to particular facts has not reached scientific exactness, and never will. It is hadly to be expected, therefore, that the courts of the different States which have adopted the act will always agree in the construction and application of its provisions. Actual uniformity in the law of negotiable instruments will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for. The conclusions we have reached with respect to the instrument in question are in harmony with the former decisions of this court and accord with our view of the proper construction to be given to the language of the statute.

The trial court erred in holding the instrument negotiable and in directing a verdict. The judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with these views. All the justices concurring.

Decision No. 1421.

HESS et al. v. SCHAFFNER.

(Court of Civil Appeals of Texas. Galveston. June 29, 1911.)

139 S. W. 1024.

ALTERATION OF INSTRUMENTS — BILLS AND NOTES — PRINCIPAL AND SURETY.

Where the name of one of several signers of a note was erased before delivery by drawing marks through his name, the effect of the erasure was to take such name off the note, to the same extent as if it had never been signed thereto.

No agreement of sureties on a note, among themselves, that, if all of them were not bound, none of them should be, would affect the rights of the payee, unless he

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had notice of the agreement, and that it had been violated prior to or at the time that he took the note and parted with the consideration.

Where a note, when presented to the payee, had on it the names of five signers, four of whom were sureties for the principal maker, but the name of one of such sureties had been erased, the payee, in the absence of knowledge or notice to the contrary, was entitled to presume that such erasure had been made with the consent of the other sureties; the mere fact of such erasure being insufficient to put the payee on notice that it had been made without the consent of the other sureties, and released them from liability.

Where the payee of a note signed by four persons as sureties, before taking the note and parting with the consideration, had notice that the name of D., one of the sureties, had been erased without the consent of V., who had previously signed, and that he was not to be bound, unless D. was, V. would be released; and if the subsequent signers signed after the name of D. had been erased such erasure would not of itself affect their liability, but if it was effective to release V., and it was agreed that such subsequent signers should only be bound on condition that V. remained, and the payee had notice of the fact at or before it took the note and parted with the consideration, then such release of V. would also release such subsequent signers.

Appeal from Austin County Court; C. G. Krueger, Judge.

Action by F. C. Schaffner against Henry Hess and others. Judgment for plaintiff, except as to defendant Damek, and the other defendants appeal. Reversed and remanded.

W. I. Hill and JJohnson, Matthaei & Thompson, for appellants. R. L. Watkins and W. A. Wurzbach, for appellee.

REESE, J. This suit was instituted in the County Court of Austin county by F. C. Schaffner, president of Lessing Lodge No. 12, O. D. H. S., against Henry Hess, W. F. Viereck, John Damek, Theo. Koy, and John Roesler, to recover the amount due upon a certain promissory note for $500 principal, with interest and attorney's fees. Upon trial with a jury, plaintiff had judgment against all of the defendants, except John Damek, from which the other defendants appeal.

The petition alleges that F. C. Schaffner, the plaintiff, is the duly elected, qualified, and acting president of Lessing Lodge No. 12, of the Order of Sons of Herman, in the State of Texas, and that he sues for and in behalf of the said lodge. The cause of action is thus stated: "And for cause of action plaintiff represents to the court that heretofore, to wit, on the 26th day of December, A. D. 1907, the defendants made, executed, and delivered to the said Lessing Lodge their note, in words and figures substantially as follows:

"'$500.00. Sealy, Texas, Dec. 26, 1907. One year after date, I, we, or either of us, promise to pay to the order of Chas. Himly, president of the Lessing Lodge No. 12, O. D. H. S., or his successor in office, for account of Lessing Lodge No. 12, O. D. H. S., under the jurisdiction of the Grand Lodge of the Order of the Sons of Herman in the state of Texas, the sum of five hundred and no/100 dollars, for value received, with interest at the rate of 6% per annum, from date until paid, with an additional fee of 10% if placed in the hands of an attorney for collection. Due Dec. 26, 1908. [Signed] Hy. Hess. W. F. Viereck. John Damek. Theo. Koy. John Roesler.'"

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Hess pleaded general demurrer, general denial, and further set up his discharge in bankruptcy, which, however, he failed to prove. Viereck, Koy, and Roesler filed jointly a plea under oath denying the execution by them of the note sued on, and specially setting up that the name of John Damek, one of the sureties on the note, had been erased without their knowledge or consent; that the consideration for the execution by each of them of the note (all of them being sureties for Hess) was that they should all be equally bound, and that the erasure of the name of Damek as one of the sureties, made without their consent, released them from all liability on the note; that the name of Damek was erased before the note was delivered to the payee; and that the payee had notice of the facts above alleged. They further denied generally the allegations of the petition.

Upon the trial appellee offered in evidence a promissory note exactly in the terms of that set out in the petition, except that the name of John Damek, one of the signers, was carefully erased by three distinct parallel lines drawn in ink through the name thus "John Damek." To the introduction of this note, appellants objected, on the ground of variance from the note sued on and described in the petition, which objection was overruled, and the note admitted in evidence, to which appellants took a bill of exceptions, and complain of the ruling by their third assignment of error. No reference is made in the petition to this erasure. The name of John Damek appears as one of the signers of the note in the instrument set out in full in the petition, without erasure. The petition set out the execution of a promissory note by all of the defendants. Damek pleaded non est factum, and there was no attempt to deny by the evidence the truth of his plea; it being shown by the undisputed evidence that his name was erased before delivery of the note to the lodge, and that in fact no liability was claimed against him. The court peremptorily instructed a verdict in his favor. The lodge in fact accepted the note as that of Hess and the other three sureties alone. This is not really material in passing upon the objection to the introduction of the note, but is stated by way of explanation and to rebut any possible inference that the erasure was made by mistake, and that it was intended nevertheless that Damek should still be bound. If such had been the case, it would have been necessary, as basis for proof thereof, that such facts should have been specifically pleaded. The effect, then, of the erasure was to take Damek's name off the note. It stood thereafter just as if his name had never been signed to it. Messick v. Ward, 1 Grant's Cas. (Pa.) 437; Bouvier's Dict., title Erasure.

The note introduced in evidence was in fact a note signed by Hess, Viereck, Koy, and Roesler. The note declared upon was a note signed by these parties and John Damek. The variance was fatal. 1 Greenleaf's Ev. 58; Roseborough v. Gorman, 6 Tex. 313; Brown v. Marton, 19 Tex. 343; Shipman v. Fulcrod, 42 Tex. 248; McDonald v. Walker, 95 Ala. 172, 10 South. 225; Phillips v. Singer Mfg. Co., 88 Ill. 305; Reitz v. Board of Trustees, 3 Ill. App. 448; Fort Wayne v. Jackson, 7 Blackf. (Ind.) 36; Lawrence v. Willoughby, 1 Minn. 65.

Appellee should, in declaring upon the note, have declared upon it as the note of Hess, Viereck, Koy, and Roesler, with proper allegations explaining the signing of the name of John Damek, and

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the subsequent erasure of his name before delivery of the note. If he undertook to set it out in haec verba, the note so copied in the petition should contain the name of John Damek as one of the makers, with the erasure, as in the note itself, and with proper allegations explanatory of the erasure. This would be the safer course, though we are not prepared to say that it would not be proper to declare on the note as though the name of John Damek had never been signed to it.

We will pass briefly upon the remaining assignments of error, It is urged by the first assignment that the court erred in overruling the demurrer to plaintiff's petition. We cannot find that any such demurrer was interposed by the pleadings of appellants, or acted upon by the court. There is a general demurrer in the answer of Hess, and also in the original answer of Viereck, Koy, and Roesler, which was superseded by their amended answer, which contains no demurrer or exception, and none was acted upon by the court. However, the objections urged to the petition by the assignment are not sound. The note is payable to Himly, president of the lodge, or his successor in office, and the petition alleges that plaintiff Schaffner is such successor. This is sufficient.

There is no merit in the grounds urged in arrest of judgment. It merely appears that at this time appellee had, by oversight, it is presumed, omitted to file the note with the clerk. As the note is copied in the statement of facts, this omission must have been corrected, and appellants are not prejudiced by the omission.

Other asignments complain of the charge of the court, and we will not discuss the several objections urged, which, in the main, are not sound. The charge contains several inaccuracies which will not occur on another trial. It is sufficient for the purposes of another trial that we indicate briefly the principles of law which we conceive control the disposition of the questions involved.

No agreement of the sureties among themselves, to the effect that if all of them were not bound none of them should be, would be binding upon or affect the rights of the payee of the note, unless he had knowledge or notice prior to or at the time he took the note and parted with the consideration of such agreement, and that it had been violated. 32 Cyc. 44, 45; Joyce v. Cockrell, 92 Fed. 838, 35 C. C. A. 38; Tabor v. Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; Seaton v. McReynolds, 72 S. W. 874; Bopp v. Hansford, 18 Tex. Civ. App. 340, 45 S. W. 748; Bannister v. Wallace, 14 Tex. Civ. App. 452, 37 S. W. 250.

Appellee, when the note was presented by Hess with the names of all the appellants signed to it, but with the name Damek, which had been signed, erased, in the absence of knowledge or notice to the contrary, had the right to assume that such erasure had been made with the consent of the others. The mere fact of such erasure did not put appellee upon notice that such erasure had been made without consent of the othe sueties, and released them from liability. Having signed the note and intrusted it to Hess, upon them, and not upon appellee, must fall the consequences of any violation of duty by Hess to appellants. 32 Cyc. 46; Smith v. Peoria Co., 59 Ill. 412; Bank v. Boddicker, 105 Iowa 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; Tidball v. Holley, 48 Cal. 610; Comstock v. Gage, 91 Ill. 328.

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If appellee had notice, before taking the note and parting with the consideration, that Damek's name had been erased without the consent of Viereck, and that he was not to be bound, unless Damek was, he would be released. If Koy and Roesler signed after the name of Damek had been erased, such erasure would not of itself affect thei liability; but if the effect of such erasure under the principles above stated was to release Viereck, and it was agreed that Koy and Roesler would only be bound at all on condition that Viereck remained, and appellee had notice of this fact, at or before it took the paper and parted with the consideration, then such release of Viereck also operated to release Koy and Roesler. This last principle of law seems not to have been recognized by the court's charge, which is otherwise correct in its general application of the principles of law to the facts of the case, though in some particulars inaccurate.

For the error indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

Decision No. 1422.

COLEMAN v. STOCKE.

(St. Louis Court of Appeals. Missouri. July 15, 1911.)

139 S. W. 216.

BANKRUPTCY — BILLS AND NOTES — CHECKS — BONA FIDE HOLDERS — BAD FAITH.

In an action by a trustee to compel an accounting for a bankrupt's money wrongfully appropriated in fraud of its creditors, evidence held to sustain a finding that certain funds of the bankrupt were used to pay the debts of its president in fraud of creditors.

One receiving the check of a corporation in payment of a personal debt of an officer is prima facie charged with notice that the officer is not authorized to use the corporate funds for such purpose, and hence is bound at his peril to inquire as to the truth of the situation.

Evidence held to sustain a finding that defendant acted in bad faith in accepting a check from the president of a corporation, drawn on the corporate funds for his personal debt, in that he knew facts suggesting the defect in the officer's title to the funds.

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Suit by Frank B. Coleman, trustee in bankruptcy of Meier China & Glass Company, against Jacob Stocke, Jr. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Frumberg and A. R. Russell, for appellant. Block & Sullivan, for respondent.

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NORTONI, J. This is a suit by the trustee of a bankrupt estate for an amount of money belonging to the bankrupt, which it is alleged defendant wrongfully appropriated to his use in fraud of the bankrupt's creditors. Plaintiff recovered, and defendant prosecutes the appeal. A jury was waived and the issue tried before the Circuit Court. No instructions or declarations of law were asked or given, and the only question with which we are concerned on appeal is the sufficiency of the evidence to support the finding for plaintiff.

It appears plaintiff is the trustee in bankruptcy of the estate of the Meier China & Glass Company, a corporation, which was adjudicated a bankrupt July 23, 1908, on a petition filed by the ceditors of the corporation on June 15th of that year. One Fred C. Meier was president of the bankrupt corporation, and his brother, Alex R. Meier, was its secretary and treasurer. The evidence tends to prove that nearly two years prior to the proceedings in bankruptcy against the corporation Fred C. Meier, president of the company, personally borrowed $3,500 from defendant and executed his demand note therefor, which was signed as well by his brother, Alex R. Meier, as surety. There is an abundance of evidence in the record to the effect that this obligation was the personal debt of Fred C. Meier to defendant, and not that of the corporation at all, and, as before stated, the note was signed by both Fred C. and Alex R. Meier. It appears that on numerous occasions during the year and a half before the bankruptcy of the corporation, defendant urged the two Meiers to pay the note, and that they were unable to do so. The corporation was insolvent, but it suffered a loss by fire which resulted in the collection of about $28,000 on its policies of insurance, in the early part of June, 1908. This money was deposited in the National Bank of Commerce, in the city of St. Louis, and checked against by the corporation until about $16,000 remained on June 8, 1908. On that day the Meiers informed plaintiff they were ready to settle his note. By arrangement, he met Mr. Alex R. Meier, the secretary and treasurer of the corporation, at the Planters' Hotel and delivered the $3,500 note to him, whereupon Mr. Meier gave plaintiff the corporation's check for $16,000 on the National Bank of Commerce, and instructed him to draw the money thereon and "pay us the difference between what we owe you in cash." This check was drawn against the funds of the corporation, deposited in the bank, and in the name of the corporation, by Alex R. Meier, its secretary and treasurer. The check, as before stated, was in the amount of $16,000 and payable to the order of cash. Defendant cashed the check and received $16,000 of the corporation money therefor, from which he deducted $3,500, the amount which Mr. Fred C. Meier owed him, and for which Alex R. Meier was security, and paid the remainder thereof, $12,500, to Alex R. Meier at the Planters' Hotel, where the parties met and had lunch together. So much appears from the admissions of defendant in proof, and it goes without saying that there is substantial evidence in the record to support the finding of the court.

As before stated, the corporation was insolvent at this time, and the Meiers had been hard pressed for money for more than two years, as defendant well knew, for he says they had put off the payment of his note from time to time because of their inability to meet it. The note

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was finally paid, as above stated, on June 8th, and seven days thereafter the proceeding in bankruptcy was instituted by the creditors, though the adjudication of bankruptcy against the corporation was not had until July 23d. The facts and circumstances stated afford an abundance of evidence in support of the finding that the transaction by which the $3,500 of the corporation's funds was employed in paying the personal debt of its president is fraudulent as to the creditors of the corporation, whose interests the trustee in bankruptcy here represents.

Where one receives the check of a corporation on its private funds in payment of the individual debt of the officer of the corporation who drew the check, or in payment of a debt for which such officer is obligated, he is prima facie chargeable with notice that such officer is not authorized to use the corporate funds for that purpose, and is bound to inquire as to the real situation. In other words, where such a creditor of the officer of a corporation so receives the check of the corporation for such individual debt and draws the money thereon, he does so at his peril, and is liable to account therefor in an action by the corporation itself, and, of course, in the event of its bankruptcy, at the suit of the trustee in bankruptcy, who succeeds to the rights of the corporation in the premises for the benefit of its creditors. The law will not permit corporate funds to be thus misapplied by its officers for the individual benefit of its officers, and conclude the matter as an innocent transaction, when it appears the very medium by which the payment was made conveys notice on its face to the creditor of the individual officer that the funds employed are those of the corporation. See Rochester, etc., Turnpike Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; Wilson v. Met., etc., R. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625; Kitchens v. Teasdale Commission Co., 105 Mo. App. 463, 468, 79 S. W. 1177; Leigh v. American Brake-Beam Co., 205 Ill. 147, 150, 151, 68 N. E. 713.

But it is argued, as the check by which the payment was made to defendant was drawn by the corporation, payable to the order of cash, and not directly to defendant, defendant should be treated as a holder thereof in due course at the time he cashed it. It is said that he gave value therefor, in that he surrendered and canceled his debt of $3,500 and repaid $12,500 of the money to Alex R. Beier, and that Meier, from whom he received the check, was presumptively a holder for value in due course. We see nothing in the argument suggested which so relieves the situation for defendant as to place it beyond the pale of the finding of bad faith. No instructions or declarations of law were given, but the court found the issue for plaintiff, as though defendant was not a holder of the check in due course at the time he cashed it. Under the negotiable instrument law, section 10,022, Rev. Stat. 1909, a holder in due course is required to be, not only one for value, but on in good faith as well, and, furthermore, one who at the time the instrument was negotiated to him had no notice of an infirmity in the instrument or defect in the title of the person negotiating it. By section 10,025 it is provided that the title of a person who negotiates an instrument is defective, within the meaning of the law, when he obtained the instrument by fraud or other unlawful means, or when he negotiates it in breach of faith, or under such circumstances as

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amounts to fraud. Section 10,026 says: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

There can be no doubt that Alex R. Meier, by thus negotiating the check of the insolvent corporation, payable to cash, for the purpose of applying either a portion or all of the funds to the payment of the individual debt of himself and his brother, acted not only without authority of the corporation, but in a breach of faith, and under such circumstances as amounted to a fraud on the corporation and its creditors. This being true, his title to the check was defective under the plain terms of the statute, and the evidence amply supports the finding that defendant had notice thereof sufficient to satisfy the provisions of section 10,026. Defendant knew the Meiers and their business concern was in a precarious financial condition, for he says, though he had bombarded them frequently, they had been wholly unable to raise the money to pay his note for eighteen months before. The mystery surrounding the meeting of defendant and Alex R. Meier at the Planters' Hotel, by arrangement, at which defendant received the corporation's check for $16,000, with instructions to collect the whole and pay over $12,500, suggests that defendant knowingly participated in a transaction not entirely fair on its face, and above all defendant knew he was receiving the corporation's funds for an individual debt, or the corporation's check negotiated by its officer therefor suggested so much on its face.

There is enough in the evidence to afford a reasonable inference in support of the judgment that at the time defendant accepted the check, with the instructions and for the purposes mentioned, he had knowledge of sufficient facts suggesting the infirmity or defect of Fred C. Meier's title thereto to justify the court in finding the transaction on his part as one in bad faith.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

Decision No. 1423.

In re A. O. BROWN & CO.

Ex parte PARKER.

(District Court, S. D. New York. April 4, 1911.)

189 Fed. 442.

SALES — CHECKS — BILLS AND NOTES — BANKRUPTCY — BROKERS.

Where on a delivery of property a check is given in payment, and the drawer, drawee, and payee all live in the same city, so that it may be presented at once, in the absence of an agreement or understanding to the contrary, the drawer must be

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held to represent that the drawee is already in funds to meet it, and, if not, the payee may rescind the sale and reclaim the property.

Claimant directed bankrupts, who were brokers, through a brance office, to sell certain stocks, which the bankrupts did, delivering stock of their own and receiving payment therefor. On being advised of the sale, claimant delivered her stock to the manager of the branch office, and received from him a check in payment therefor. There were no funds in the drawee bank to meet the check at the time it was drawn. The bankrupt's insolvency followed, and it was not paid. Held, that claimant had the right to recover the proceeds of her stock from the bankrupt's trustee, if they had not been dissipated, and, if they had been, she had the right to rescind the delivery and reclaim her stock, subject, however, to the right of the trustee to retain it by paying her the amount for which it was sold, and that it was therefore practically immaterial whether or not the bankrupts had converted the proceeds.

In the Matter of A. O. Brown & Co., bankrupts. Ex parte Bessie H. Parker. Order in favor of claimant.

See, also, 189 Fed. 432.

Ralph Wolf, for trustee. Henry L. Sprague, for claimant.

HAND, District Judge. It now appears that when Becker gave the check to Mrs. Parker, there were no funds in his account. The question is what Becker's representation really was, and what Mrs. Parker had the right to believe was involved in giving her a check at all. If the natural meaning of the transaction was that there was money there at the time subject to withdrawal by the check, then she may rescind, for confessedly that representation was untrue. If, on the other hand, the representation is only a promise that there will at some future time — that is, when she chooses to present the check, be funds to meet it — then there is no misrepresentation of fact unless Becker at the time did not intend to put the drawee in funds, bfore the check should be presented, of which there is no evidence.

Now a check is undoubtedly a draft, and, in the case of a time draft, I suppose no one would say that there was any representation by the drawer that the drawee was in funds in præsenti. Every one knows that business usage does not contemplate that the drawee shall be in funds until the draft is due. The trustee makes a plausible argument, through what he says is the common custom among brokers in meeting out-of-town checks upon their branch offices. He says that it is customary for the branch house to wire the New York house that a check has been delivered, and for the broker to put the drawee bank in funds by wire before the check goes through the clearing house. It is doubless the custom to deposit checks and so to take twenty-four hours to cash them, and, if that were a part of the engagement so that the check could not be presented for payment except at the end of twenty-four hours, then the check would properly be held to be a time draft; and, though the time would be short, it would be also quite proper to hold that to give the check was no more than a representation that at the end of twenty-four hours the drawee would be in funds. Were that the fact, it would be impossible to show fraud or a misrepresentation of fact without showing that the drawer did not intend to put the drawee in funds when he uttered the check. However,

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though it is the usual custom to deposit checks, it is by no means the inevitable custom, nor is there anything implied in the transaction to prevent the payee from going at once to the drawee's paying teller and demanding payment in cash, or requiring a certification. Unless there is some agreement to the contrary, this right of the payee gives him immediate control over the funds in the drawee's hands, and he certainly has the right to assume that the drawee will be in funds when he appears, and that the drawer so means to represent.

In short, the period of the time of presentation of a check is by no means one day, but it is the earliest time within which the check may be presented, and that, of course, varies with the facts. In a case like that at bar, where the drawer, the payee, and the drawee all live in the same city, and where the payee may cash the check in a few minutes, the time is reduced practically to nothing, and it seems to me that the drawer must be held to represent that the drawee is already in funds, unless he indicates in some way that the check is not to be presented at once. It is of no consequence that the payee may wait and so take a chance of the drawer's and the drawee's continued solvency. If the check means that the drawee is in funds now, and if the payee accepts it as cash, he may rescind if he was misled, however innocently.

The authorities are not helpful upon this precise proposition. I have found no case in which the point was taken that there were no funds in the drawee's hands at the time the check was given, except cases in which there was in addition clear proof of fraud, such as Earl of Bristol v. Wilsmore, 1 B. & C. 514; Keable v. Paine, 8 A. & E. 555. In the other cases the rule seems to be confused with the rule which exists in many jurisdictions, that delivery by a seller upon a cash sale is not of itself a waiver of the condition of payment. I believe that this rule is quite wrong in principle (Williston on Sales, § 346); nor is there any authority binding upon me. At least such a delivery must be held to be presumptive evidence of waiver and this appears to be the rule in New York. Osborn v. Gantz, 60 N. Y. 540. That question, however, in the light of the present facts is immaterial.

The last question is as to whether the failure to prove the dissipation of the proceeds changes the claimant's rights. Whether the proceeds are traceable or not, the trustee still has the right to keep this stock, even though acquired by fraud, if he will pay the proceeds, or the amount of the proceeds, for which it was sold. This right he has in spite of the fact that the claimant's assent to a delivery was procured by fraud, because her assent was not necessary to the brokers' right to demand the stock at any time upon tender of the proceeds. He therefore, even after the delivery is rescinded, retains the right which the brokers had to retain the stock upon that condition.

Coming back now to the failure to prove that the proceeds have been dissipated, it is apparent that this makes no difference in the result, because, if they are not dissipated, the claimant is confined to the proceeds, while, if they are, yet the trustee may still retain the stock upon paying to her the equivalent. How, then, can the trustee complain of a failure to prove that he has not got the proceeds? If he has them, he must pay them over, but he may keep the stock. If he has not got them, he may pay over their equivalent and keep the

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stock. The only change in his position is that, if she had proved that he did have the proceeds, he would have had to pay them, whether or not the value of the stock had fallen. That, however, is her right, not his. Her failure to prove that only eliminates her right to insist on the proceeds. If he is given the option to pay either amount of the proceeds or stock, which option he has even if the proceeds themselves be gone, he is in no worse position than if he had the proceeds. Therefore, if an order be entered giving him that option, the issue of whether or not the proceeds are dissipated becomes immaterial.

What I said in the earlier opinion was correct enough, and would result strictly in compelling the claimant to show that she could not get the actual proceeds. Since, however, the amount of the proceeds is the precise equivalent of the actual proceeds, it seems to me of no consequence to require proof of a matter which, while formally necessary, makes not the slightest substantial difference in result. As it does not concern any one whether the claimant traces and gets the actual proceeds, or gets the equivalent sum of money by way of tender from the trustee, I shall not require any proof upon the subject. I had not carried out the detail of this reasoning before, as it was not necessary, while there was no misrepresentation, and while so far as appeared the claimant upon delivering the stock had accepted the broker's credit.

Let an order pass directing the trustee at his option to turn over either the certificate or the amount of the proceeds at which the stock sold.

Decision No. 1424.

EQUITABLE POWDER MFG. CO. v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Arkansas. June 26, 1911.)

138 S. W. 964.

CARRIERS.

A carrier acts at its peril in the delivery of freight, and neither fraud nor mistake will excuse a delivery to one not the consignee.

Appeal from Circuit Court. Sebastian County; Daniel Hon, Judge.

Action by the Equitable Powder Manufacturing Company against the St. Louis & San Francisco Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. F. Evans and B. R. Davidson, for appellant. Falconer & Woods, for appellee.

HART, J. This is an appeal by the Equitable Powder Manufacturing Company from a judgment upon a directed verdict in a suit brought by it against the St. Louis & San Francisco Railroad Company for the value of a car of powder, which was alleged to have been converted by the railway company. The facts are substantially

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as follows: On November 18, 1908, appellant delivered to appellee, at Ft. Smith, Ark., a car of powder, consigned to the Wise-Moist Coal Company at Henryetta, Okla., but intended for the Wise-Moist Coal & Lumber Company, of whose financial standing appellant had made investigation, and whose credit was good. The order for the car was a telegram dated November 17, 1908, signed by B. W. Pulling, whom Mr. Bedwell, agent for appellant, believed to be the agent at Henryetta of the Wise-Moist Coal & Lumber Company. This company, however, had its principal office at Oklahoma City, and had withdrawn from business at Henryetta on September 1, 1908. Prior to this time the Wise-Moist Coal & Lumber Company had been purchasing the entire output of a certain coal mine operated at Henryetta and known as the "Worden mine." The coal, when purchased, was resold and shipped by the Wise-Moist Coal & Lumber Company to the purchasers at various points. R. E. Moist was president of the Wise-Moist Coal & Lumber Company, and B. W. Pulling was the general agent of the company at Henryetta. The R. E. Moist Company, a corporation of which R. E. Moist was also president and owner of nearly all the stock, began to operate the Worden mines on September 1, 1908. That company sold the coal it mined, and thereafter the Wise-Moist Coal & Lumber Company, as above stated, ceased to do business at Henryetta; and this fact was known to the agent of the appellee railway company at that place. Letters containing orders for coal were sent there after September 1st, to the Wise-Moist Coal & Lumber Company, and were opened by Pulling, who was the general agent of the R. E. Moist Company. The orders were filled, and the coal was shipped out in the name of the R. E. Moist Company. Both companies were incorporated. Pulling was employed by the R. E. Moist Company, and received no salary from the Wise-Moist Coal & Lumber Company. Pulling receipted for the shipment of powder in his own name, and says that the two corporations were so closely identified in interest that the matter of which company he was receiving it for did not enter his head. Pulling admits that he had no authority conferred upon him by the Wise-Moist Coal & Lumber Company to act for it after September 1, 1908. He stated that R. E. Moist directed him to take charge of his affairs there, and beyond that he had no authority. He further stated that he ordered the powder for the R. E. Moist Company, and that the powder was used by that company after it was received. The company became insolvent, and was unable to pay the purchase price of the powder.

A carrier acts at its peril in the delivery of goods, and no circumstances of fraud or mistake will excuse a delivery to a person other than the consignee. Little Rock, Miss. Riv. & Tex. Ry. Co. v. Glidewell, 39 Ark. 487. This is conceded to be the law by appellee, ground that the undisputed evidence shows that Pulling had authority to act for the consignee in receiving the goods, and that he did so act. We think, however, this question should have been submitted to the jury. It is true that Pulling says that he had authority from R. E. Moist to take charge of his affairs at Henryetta, and that R. E. Moist was president of the Wise-Moist Coal & Lumber Company, to whom the powder was consigned. He further says that the two corporations were so closely identified that it never entered his head

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for which one he was receiving the powder. On the other hand, he says that the Wise-Moist Coal & Lumber Company had ceased to do business at Henryetta for two months before the powder was ordered (and this fact was known to the agent of appellee at that point). Pulling purchased the powder for the R. E. Moist Company, and it was used by that company. From these facts, a jury might have found that it was delivered to Pulling as agent for the R. E. Moist Company.

For the error in directing a verdict for appellee, the judgment will be reversed, and the cause remanded for a new trial.

Decision No. 1425.

STATE v. CORVALLIS & E. R. CO.

(Supreme Court of Oregon. September 19, 1911.)

117 Pac. 980.

RAILROADS — CARRIERS — CONSTITUTIONAL LAW.

The words "regular station," as used in Railroad Commission Act 62 (Ore.), § 22, requiring every railroad to provide and maintain adequate and suitable depot and toilet buildings at its regular stations where an agent is maintained, means a place established on the road where trains are regularly stopped to receive and discharge passengers and freight, and where the carrier keeps an agent for the transaction of business, so that, in an action against a railroad company for a penalty for failure to construct a depot building pursuant to an order of the Railroad Commission, it may be inferred, from an averment that the station is a "regular station," that defendant maintains an agent there.

Since Railroad Commission Act (Ore.), § 31, provides that any service prescribed by the commission shall be prima facie reasonable, until found otherwise in an action for that purpose, the reasonableness of an order of the Railroad Commission prescribing service can only be assailed in a proceeding under section 32, authorizing any railroad affected by an order of the commission to commence suit against the commissioners to vacate the order, on the ground that the service required is unreasonable; so that, in an action by the State against a railroad company for a penalty for noncompliance with an order requiring the erection of a depot, the complaint need not allege that the erection and maintenance of a depot was essential, nor state the volume of railroad business transacted at the station, since the order of the commission, not having been vacated, established prima facie the reasonableness of such service.

Under the rule that the owner of property set apart to a public use impliedly agrees to be governed by such reasonable regulations as the public may adopt to promote the common convenience and general welfare, the State may enact reasonable regulations fixing the rates for transportation of freight and passengers, or prescribing any reasonable rules as to service, if such regulations do not interfere with interstate commerce, or take property for public use without just compensation, or violate any express charter provision granted by the State to the corporation.

While the legislature cannot delegate its power to enact laws, it may direct that the application of a statute to a given district or to a specific state of facts shall

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depend upon the existence of certain conditions, to be ascertained in a particular manner, or by particular persons.

Constitution, art. 3, divides the powers of government into the legislative, the executive, including the administratve, and the judcial departments, and provides that no person charged with official duties under one of them shall exercise any function of another. The Railroad Commission Act (Ore.), § 12, requires every railroad to furnish reasonably adequate service, equipment, and facilities. Section 22 requires every railroad to provide and maintain suitable depot buildings and clean toilet rooms at its regular stations. Section 28 provides that upon complaint of any person that any service is inadequate the commission may notify the company that complaint has been made, and, after giving it ten days' notice, may investigate the charge, compelling the attendance of witnesses, etc.; and, if the service be found insufficient, may make such orders in regard thereto as are reasonable. Section 53 imposes a penalty for neglecting any order of the commission. Held, that the Railroad Commission Act did not violate Const., art. 3, by empowering the commission to determine whether railroad companies had complied with their statutory duties as to service, etc., and to prescribe what was a reasonable service, in case they were not rendering such service.

A common carrier is not required by the common law to provide passenger or freight depots, but may be required to do so by statute.

If railroad companies are required by statute to erect suitable depots, the power to determine when they should be required to erect a depot at a particular place may be delegated to a railroad commission.

The Railroad Commission must have express authority for its acts under the Railroad Commission Act, as no authority will be implied.

Railroad Commission Act (Ore.), § 12, requires every railroad to furnish reasonably adequate service, equipment, and facilities, and section 28 provides that upon complaint that any service in the transportation of persons or property is inadequate notice must be given the company complained of which may file an answer, whereupon a hearing shall be ordered; and, if it be found that the service is inadequate, the commission may make a reasonable order as to the service. Held, that the Railroad Commission, upon proper investigation, may make an order requiring a railroad company to erect a passenger waiting room and freight depot at its station.

The Railroad Commission may require a railroad company to maintain an agent at the depot to enable the public to transact business with him; the word "service" as used in the act including the maintenance of a station agent.

In an action by the State against a railroad company for a penalty for a violation of an order of the Railroad Commission requiring the erection of a passenger and freight depot, evidence that defendant had not employed any one at the station with whom shippers could negotiate for transporting freight was admissible.

Appeal from Circuit Court, Linn County; Geo. H. Burnett, Judge.

Suit by the State of Oregon against the Corvallis & Eastern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover a penalty for failure to comply with an order of the Railroad Commission. The complaint states in effect that the defendant is, and at all times therein alleged was, a private corporation owning and operating a railroad extending from Yaquina, Ore., to Detroit, in this State, its line of railway passing through the

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town of Lyons, which latter village "is a regular station;" that certain named persons, constituting the Railroad Commission of Oregon, in a proceeding before them, wherein T. E. Wall and others were complainants and the defendant herein was defendant, made an order, July 21, 1908, after due hearing and consideration, that the defendant build and maintain at Lyons a depot containing a waiting room for passengers and a room for freight in less than carload lots, containing in such apartments not less than 150 and 250 square feet, respectively; to erect and maintain separate toilets, or a toilet building with separate compartments; and also to engage and keep employed at that station a caretaker, with whom the public might transact business relating to the transportation of freight and passengers, which improvements were required to be made and the servant employed within forty-five days after the service upon the defendant of such order, which was duly made July 22, 1908; that, though more than the time so limited had expired, the defendant had failed and refused to comply with such demand, in consequence of which it had become liable to the plaintiff in the sum of $10,000, for which judgment was demanded. A demurrer to the complaint, on the ground that it did not state sufficient facts, and that the court did not have jurisdiction of the subject of the action, was overruled. An answer and a reply put in issue the facts averred by the respective parties, whereupon a trial was had, and, judgment for the sum of $200 having been rendered against the defendant, it appeals.

J. K. Weatherford, for appellant. A. M. Crawford, Attorney-General (I. H. Van Winkle, Assistant Attorney-General, and W. P. Lord, Jr., on the brief), for the State.

MOORE, J. (after stating the facts as above). It is maintained that in overruling the demurrer an error was committed. It is argued that as the complaint fails to aver that defendant maintained an agent at Lyons plaintiff's primary pleading does not state facts sufficient to constitute a cause of action. Section 22 of the Railroad Commission Act, so far as deemed to be involved on this branch of the inquiry, is as follows "It shall be the duty of every railroad to provide and maintain adequate depots and depot buildings, and clean and suitable toilet rooms, or buildings at its regular stations where an agent is maintained." Laws Oregon 1907, p. 75. As we view the quoted language, a "regular station" is a place established by a railroad company on the line of its railway where some or all trains are regularly halted to receive and discharge passengers and freight, and where, for the transaction of business, the carrier keeps an agent with whom the public is authorized to deal. 26 A. & E. Ency. (2d Ed.) 495; Land v. Wilmington & Weldon R. Co., 104 N. C. 48, 10 S. E. 80. The clause, "where an agent is maintained," adds nothing to the phrase, "at its regular stations." It seems, however, to explain the meaning of the latter term. It is reasonably to be implied from the averment that Lyons is a regular station on the railroad, that the defendant maintains at that place an agent for the accommodation of passengers, etc., and is tantamount to an allegation to that effect. The complaint is sufficient in that particular.

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It is contended that because the volume of business transacted by the defendant at Lyons is not given, nor is it averred that the erection and maintenance of any railroad buildings at that place are necessary, the complaint is insufficient. Section 31 of the act under consideration declares that any service prescribed to be rendered by the commission shall be prima facie reasonable, until finally found to be otherwise, in an action brought for that purpose. Section 32 provides that any railroad interested in or affected by an order of the commission, being dissatisfied therewith, may commence a suit against the commisisoners as defendants, to vacate and set aside such order on the ground that the service demanded is unreasonable. It will be noted that the reasonableness of an order of the commissioners, prescribing any service, can only be challenged by a railroad company in a suit instituted for that purpose by it as plaintiff against the commisisoners as defendants. As the order fixing the service to be performed is prima facie reasonable, it was unnecessary to allege that fact in the complaint, or to aver that the erection and maintenance of a depot at Lyons was essential, or to state the volume of railroad business transacted at that place.

It is insisted that the court did not have jurisdiction of the cause, for that the Railroad Commission Act attempts to delegate to the commissioners legislative, executive, and judicial powers, in contravention of article 3 of the Constitution of Oregon, and such being the case an error was committed in overruling the demurrer. That part of the organic act referred to is as follows: "The powers of the govenment shall be divided into three separate departments — the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." A brief reference to some of the provisions of the statute in question, in addition to the sections hereinbefore adverted to, is necessary to understand the legal principle involved. The act in force when this case was tried creates a commission, consisting of three persons, collectively known as the Railroad Commisison of Oregon. Section 1. The term "railroad" as used therein is defined. Section 11. Every such railroad is required to furnish reasonably adequate service, equipment, and facilities. Section 12. It is incumbent upon every railroad to provide and maintain suitable depot buildings and clean toilet rooms at its regular stations. Section 22. Upon complaint of any peson that any service appertaining to the transportation of persons or property is inadequate, the commission may notify the railroad company informed against that complaint has been made, and ten days after such notice has been given the commission may investigate the charge, compelling the attendance of witnesses and the production of books and papers. If upon such examination the service shall be found to be insufficient, the commission is empowered to make such orders respecting the matter as shall be determined to be reasonable, which regulation shall be observed and followed in the future. Section 28. If any railroad shall fail, neglect, or refuse to obey any order made by the commissioners, for every such violation it shall forfeit and pay into the State treasury a sum not less than $100 nor more than $10,000

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for such offense. Section 53. Any forfeiture or penalty so prescribed may be recovered by an action brought thereon in the name of the State of Oregon. Section 57. It will thus be seen that the Railroad Commission of Oregon is required to receive complaints of certain matters, when properly made against a railroad company for a violation of any of the duties enjoined by the statute, to give notice thereof to the company, to set the cause for hearing, to determine the issues involved, and to make the necessary orders in the premises. Does an exercise of the powers so granted trench upon article 3 of our Constitution?

As a preliminary matter, it may be said that the provisions of a written constitution, distributing legislative, executive, and judicial powers to different departments and the emphatic declaration in the fundamental law that each branch must be kept separate, were evidently designed to establish and perpetuate an independent commonwealth. "The safety of free government," says Mr. Justice Vann, in People ex rel. v. Howland, 155 N. Y. 270, 282, 49 N. E. 775, 779 (41 L. R. A. 838), "rests upon the independence of each branch and the even balance of power between the three. Unite any two of them, and they will absorb the third, with absolute power as a result. Weaken any one of them by making it unduly dependent upon another, and a tendency toward the same evil follows. It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others." To the same effect, see Story, Const. (5th Ed.), §§ 520 and 521, where he states that Montesquieu seems to have been the originator of the political maxim of the division of the three great powers of government. Judge Story, at section 527 of the textbook mentioned, referring to the distribution of such powers, remarks: "Indeed, there is not a single constitution of any State in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." As illustrative of the rule and the exception thus adverted to, see the case of Winchester & Strasburg R. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692.

Considering the principal inquiry, it is a well-recognized rule of law that when property is set apart by its owner to a public use he, by the dedication, impliedly agrees to be governed by such reasonable regulations as the public may adopt that are designed to promote the common convenience or to advance the general welfare. "Property," says Mr. Chief Justice Waite, in Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, "does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." From the

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principle thus announced it follows that the Legislative Assembly of a State, as the agent and representative of the public, may enact any reasonable regulation ordaining, within the limits of its jurisdiction, rates for the transportation of freight and passengers, or prescribing any reasonable rule governing the service to be performed by the carrier, when such rules neither interfere with interstate traffic nor amount to a taking of property for a public use without just compensation, nor violate any express charter provision granted by the State to the corporation. Chicago, Burlington & Quincy R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik v. Chicago & Northwestern R. Co., 94 U. S. 164, 24 L. Ed. 97; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841.

The rule is universal that, as a legislative assembly exercises an authority conferred y the Constitution, it cannot delegate the power to enact laws. It may, however, direct that the application of a statute to a designated district or to a specified state of facts shall depend upon the existence of certain conditions to be ascertained and determined in a particular manner. Thus a statute authorizing the location of a county seat at one of two or more designated places may be delegated to the qualified electors of a county, to determine, at an election to be held for that purpose, the place of their choice. McWhirter v. Brainard, 5 Ore. 426, 430. "The power of location," says the court in that case, "is exercised by the Legislative Assembly, but it takes effect in a peculiar mode, or not at all, by a vote of the electors interested." So, too, it has been held that the question of whether or not the provisions of a general local option law, containing a complete declaration of legislative will, might, pursuant to the terms of the act, be applied to a particular district by a vote of the electors thereof, and that such statute did not contravene section 21 of article 1 of the organic act, declaring that no law shall "be passed, the taking effect of which shall be made to depend upon any authority except as provided in this Constitution." Fouts v. Hood River, 46 Ore. 492, 81 Pac. 370, 1 L. R. A. (N. S.) 483. "The Legislature," says Mr. Justice Agnew, in Locke's Appeal, 72 Pa. 491, 498, 13 Am. Rep. 716, "cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation." This excerpt has been quoted and the principle thus announced followed in this State. State v. Briggs, 45 Ore. 366, 370, 77 Pac. 750, 78 Pac. 361; Sandys v. Williams, 46 Ore. 327, 335, 80 Pac. 642.

Where a statute creates a board of railroad commissioners and empowers it to make rules and regulations for the government of common carriers, the act itself is the controlling feature, and does not amount to a delegation of legislative authority. 2 Elliott, Railroads (2d Ed.), § 678. It will be remembered that the statute under consideration declares that "every such railroad is hereby required to furnish reasonably adequate service, equipment, and facilities," and that "upon complaint of any person . . . that any service is inadequate

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the commission may notify the railroad complained of," etc. Section 28. It will be observed that the sufficiency of the facilities and the adequacy of the service can be challenged by complaint of any person, whereupon may be joined an issue that can be determined by the Railroad Commission. When a rate of transportation results from such an investigation, the adjustment of the compensation thus considered to be reasonable for the service performed partakes of some of the characteristics of an exercise of legislation, but it is not for that reason violative of the organic law of the State.

The adoption by a railroad commission of regulations fixing the measure of charges which a common carrier may exact for the transportation of freight and passengers, or the determination of any other issue of which the commission has jurisdiction, is more in the nature of an administrative act, whereby the existence of certain facts is ascertained, upon the determination of which the statute regulating such matters operates. Michigan Central R. Co. v. Michigan Railroad Commission, 160 Mich. 355, 361, 125 N. W. 549; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 394, 14 Sup. Ct. 1047, 38 L. Ed. 1014. The Legislative Assembly of Oregon, by the act declaring the obligations which the public interest impose upon a railroad company, and enumerating the duties devolving upon the Railroad Commisison, has prescribed the rule of action that controls the carrier; and intrusting to the commission the question of whether or not the railroad company, in the management of its business affecting the public, complies with the requirements of the statute, and if not to prescribe the reasonable service demanded, is not violative of article 3 of the State Constitution. Thus, in Stone v. Yazoo & Mississippi Valley R. Co., 62 Miss. 607, 645, 52 Am. Rep. 193, a statute of Mississippi creating a railroad commission and authorizing it to fix tariff charges of railroads was challenged on the ground, inter alia, that it violated sections 1 and 2 of article 3 of the Constitution of that State. The clauses of the fundamental law referred to were as follows: Section 1: "The powers of the government of the State of Mississippi shall be divided into three distinct departments and each of them confided to a separate magistracy, to wit: Those which are legislative to one; those which are judicial to another, and those which are executive to another." Section 2: "No person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Revised Code Miss. 1880, p. 21. Without discussing the question thus involved, it was held that the act did not trench upon "any provisions of the Constitution of the State."

In Stone v. Natchez, Jackson & Columbus R. Co., 62 Miss. 646, the questions presented in the preceding case were also involved, but they were not considered, on the ground that the prior decision was controlling in all matters, except the contention that the statute creating the commission violated the obligation of contracts. It was ruled, however, that such controversy was without merit.

In the Railroad Commission Cases, 116 U. S. 307, 336, 6 Sup. Ct. 334, 347, 388, 1191 (29 L. Ed. 636), Mr. Chief Justice Waite, referring to the two cases last mentioned, observes: "The Supreme Court of Mississippi has decided . . . that the statute is not repugnant to the Con-

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stitution of the State, 'in that it creates a commission and charges it with the duty of supervising railroads.' To this we agree, and that is all that need be decided in this case." The principle thus asserted was approved, though the question was not discussed in the opinion of either court.

It was said by Mr. Justice Brewer, in Chicago & Northwestern R. Co. v. Dey (C. C.), 35 Fed. 866, 1 L. R. A. 744, 750: "While in a general sense . . . it must be conceded that the power to fix rates is legislative, yet the line of demarkation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the Legislature has been content to simply establish rules and principles, leaving execution and details to other officers." In that case it was maintained, inter alia, that an act of the General Assembly of Iowa, authorizing a railroad commission to prescribe a standard of compensation for transportation that might be exacted by a railroad company, violated the Constitution of that State, which provides for the distribution of powers in terms similar to the fundamental law of Oregon, except that the executive department does not include the administrative. After adverting to several decisions of other courts, the learned justice disposed of this branch of the case as follows: "For these reasons I conclude that this contention of the complainant cannot be sustained."

In Michigan Central R. Co. v. Michigan Railroad Commission, 160 Mich. 355, 125 N. W. 549, it was maintained, inter alia, that a statute of Michigan creating a railroad commission, which was empowered to adopt rules subsequently to be applied, and to regulate rates for the transportation of freight, violated section 2 of article 4 of the Constitution of that State, in that the act conferred upon the commission legislative and executive powers. It was held, however, that the legal principle contended for was untenable, and in reviewing many decisions upon the question Mr. Justice Stone determined this branch of the case by saying: "In view of the authorities above referred to and of the rule that the courts will presume in favor of the constitutionality of a law until the contrary plainly appears, we conclude that the act in question is constitutional."

In Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Raiload Commission, 136 Wis. 146, 162, 116 N. W. 905, 911, 17 L. R. A. (N. S.) 821, it was ruled that the Legislature could create a quasi judicial tribunal, to which might be delegated the authority possessed by the lawmaking body itself to ascertain, determine, and declare facts; the court saying: "The division of governmental powers into executive, legislative, and judicial, while of great importance in the creation or organization of a State, and from the viewpoint of institutional law and otherwise, is not an exact classification." Further in the opinion it is said: "The Legislature may delegate any power, not legislative, which it may itself rightfully exercise."

The authority conferred upon the Railroad Commission of Oregon by the statute, to which reference has been made, might have been directly employed by the Legislative Assembly; but, as the commission is required to perform such service by ascertaining certain facts upon the determination of which the existing law operates, the act

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under consideration does not trench upon the clause of the State Constitution invoked to defeat its enforcement. 23 A. & E. Enc. Law (2d Ed.) 658; 8 Cyc. 832; Beale & Wyman, Railroad Rate Regulation, § 1305; Oregon Railroad & Navigation Co. v. Campbell (C. C.), 173 Fed. 957.

It is maintained that by the principles of the common law no railroad company could be compelled to erect or maintain a depot or warehouse on the line of its railway; that such ancient rule has not been modified by the enactment of any statute in Oregon commanding the putting up of such structures, nor has the Railroad Commission been empowered to determine when, where, or how depots should be constructed, and such being the case the attempted exercise of the assumed authority was unwarranted, and the court did not have jurisdiction of the subject of the action.

In South Eastern Railway Co. v. Railway Commisisoners, L. R. 5 Q. B. D. 217, 226, in construing Acts of Parliament directing railroad companies for the better accommodation of the public to erect or enlarge stations and to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic, it was determined by a majority of the court that the term "facilities" was not sufficiently comprehensive to include structural works, and that the Railway Commission had no jurisdiction to entertain an application for an order for the erection and alterations applied for. In that case section 2 of an early act (17 & 18 Vict., c. 31) contained the following declaration: "Every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." Jurisdiction was conferred upon certain courts in case of "any complaint of anything done or omitted in violation or contravention of the act," and such courts might thereupon restrain the company complained of from a further infringement of the enactment, and obedience to such injunction could have been enforced by attachment or by a fine. By the Railways Regulation Act of 1873 (36 & 37 Vict., c. 48), the jurisdiction that had thus been given to the courts was transferred to the Railway Commisisoners, but no additional authority was conferred upon them than that bestowed by the earlier statute.

Upon complaint of the town council of Hastings of a violation of the provisions of such act by the South Eastern Railway Company, an order was sought from the Railway Commissioners to enlarge the railroad stations at Hastings and St. Leonards, and to make other changes therein. The railway company invoking the common-law jurisdiction of restraining an inferior tribunal from exceeding its powers, applied for a writ of prohibition, inhibiting the Railway Commisisoners and the town council from further proceeding in the matter. A demurrer to the declaration put in issue the sufficiency of the enactments to authorize the order which was endeavored to be secured. In deciding that case, Lord Chief Justice Cockburn, speaking for a majority of the court, in answer to the legal principles asserted by counsel for the Railway Commisisoners and the town council, says: "Indeed the solicitor general, in arguing for the defendants even went

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so far as to maintain that if a company laying down a railway with a single line of rails, had taken power to raise money and lay down a second line, and the traffic was sufficient to call for it, the commissioners would have authority to order the company against their will to raise the money and law down such second line of rails. Nay, if the argument is to be carried logically into all its ulterior consequences, I can see no reason why, if it is to prevail, it will not be competent to the commissioners in the interest of the traffic to reduce the tolls on a railway to their minimum, and thus to take this most important part of their business out of the hands of a company." The potency of the conclusion thus reached is very much impaired by the dissenting opinion of Justice Lush, who, refering to the statute to be construed, propounded the following question: "The particular phrase which creates the difficulty is large enough to admit of a wider or a narrower meaning, and a preliminary question arises, namely, What is the rule of construction to be applied to it? Is the act a remedial or a penal act? and, if remedial, on whose behalf?" The inquiry is answered as follows: "This is the question at issue, and I am of opinion that there are provisions of the act which require the larger meaning to be put on the word 'facilities' in this section, and consequently that the view which the commissioners take of the meaning of the act is the right one." We believe this dissenting opinion presents the better reason, which deduction should control the interpretations of the provisions of the act creating the Railroad Commission of Oregon.

At common law it was not incumbent upon a common carrier to provide depots for the accommodation of arriving or departing passengers, or to supply warehouses for storing freight received for transportation or to be delivered to a consignee. 26 A. & E. Encyc. (2d ed.) 497; Nashville, Chattanooga & St. Louis Ry. Co. v. State, 137 Ala. 439, 443, 34 South. 401; People v. New York, Lake Erie & Western Ry. Co., 104 N. Y. 58, 9 N. E. 826, 58 Am. Rep. 484, 485. Such duty may be imposed, however, by statute, and a legislative assembly by a proper enactment can compel a railroad company to erect and maintain reasonably suitable structures for the benefit or convenience of the public. Beale & Wyman, Railroad Rate Regulation, § 224; 2 Elliott, Railroads (2d ed.), § 762; Commonwealth v. Eastern Ry. Co., 103 Mass. 254, 4 Am. Rep. 555; Railroad Commission v. Portland & Oxford Central Ry. Co., 63 Me. 269, 18 Am. Rep. 208. The duty of erecting suitable depots having been imposed upon railroad companies by an act of the legislature, the power to determine when the enactment shall be enforced at a given place may lawfully be delegated to a railroad commission. Minneapolis & St. Louis R. Co. v. Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614. In State ex rel. v. Atlantic Coast Line R. Co., 51 Fla. 578, 592, 40 South. 875, 880, it was ruled that a railroad commission could exercise such powers as were expressly or impliedly granted; the court saying: "The Railroad Commissioners of Florida are statutory officers, whose powers are those, and only those, which are conferred upon them expressly or impliedly by the statutes of the State." In Railroad Commissioners v. Oregon R. & Navigation Co., 17 Ore. 65, 75, 19 Pac. 702, 706 (2 L. R. A. 195), in construing an act creating a board of railroad commissioners, it was ruled that no authority was thereby conferred

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to require a railroad company to refund to a shipper a sum of money alleged to have been exacted in excess of a reasonable charge for shipment. In deciding that case, Mr. Chief Justice Thayer said: "The jurisdiction of such commission is not given by implication. Commissions of that character are mere creatures of statute, and possess no power except what the statute expressly confers upon them." In State v. Rogers, 22 Ore. 348, 357, 30 Pac. 74, 75, Mr. Justice Bean, referring to the enactment construed in the preceding case, observes: "This law provided for two commissioners to be appointed by the governor, who should have only supervisory powers over railways, and with no authority to in any manner regulate or fix freights or fares for carrying either freight or passengers."

Examining the act creating the present Railroad Commission of Oregon in conformity with the rule thus established, that the power conferred by the legislative assembly must be express, and that no authority will be implied, and without determining whether or not such prerogative can be reasonably included, in the absence of specific language to that effect, the statute in question will be reviewed. It will be kept in mind that section 12 of the act requires every railroad, which is a common carrier of this State, to furnish reasonably adequate service, equipment, and facilities. Section 28 declares that, upon complaint of any person that any service affecting the transportation of persons or property is inadequate, notice thereof must be given to the company complained of, which may file an answer to the charges, whereupon a hearing is ordered; and if upon such investigation it shall be found that the service is inadequate the commission is empowered to make such order respecting the service as it shall have determined to be reasonable, and which mandatory direction shall be observed in the future. It will be noted that the statute expressly grants to the commission power to regulate the matter when, upon complaint thereof, it is found that the service is inadequate. The erection and maintenance of reasonably adequate buildings at regular stations on the line of railway necessarily facilitates the dispatch of business, and it is a duty which the enactment imposes on every railroad company for the convenience of passengers and the accommodation of freight. We conclude, therefore, that the Railroad Commission of Oregon possessed plenary power to order the erection of the building described.

The construction of a suitable depot at a station would be of little value to passengers and shippers unless the carrier kept at such place, for a reasonable time before and after the arrival and departure of trains, an agent with whom the public could transact business relating to railroad traffic. The duty to maintain a representative at the place and times indicated is a service which a railroad company owes, and the performance of which may be compelled. We believe that the word "service," as used in the Railroad Commission Act, is expansive enough in its application to include the engagement by the common carrier of a station agent, the employment of whom may be enforced by order of the commissioners. The court, in our opinion, had jurisdiction of the subject of the action, and no error was committed in overruling the demurrer.

It is maintained that an error was committed in permitting testi-

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mony to be received, over objection and exception, tending to show that at Lyons the defendant had not employed any person with whom shippers could negotiate for the transportation of freight by rail. It is also contended that, as an exception was taken to the following part of the charge, the court erred in giving it, to wit: "If you find from the evidence that the defendant failed to provide and maintain at its station at Lyons, in Linn county, Oregon, a caretaker or agent with whom any person desiring to transact business with the defendant relating to ordering cars, or the receipt or the delivery of freight at said station, since the date upon which the order of the Railroad Commission of Oregon, described in the complaint and admitted in evidence, went into effect, and prior to the commencement of this suit, then your verdict should be for the plaintiff." The testimony so objected to and the instruction based thereon were within the issues respecting the alleged failure and neglect of the defendant to comply with the terms of the order of the commissioners, and no errors were committed as alleged. It was admitted at the trial in this court that at Lyons the defendant employed an agent, who sold railroad tickets, but that he did not supervise the shipping or receipt of freight.

Believing that the Railroad Commission was empowered to direct the employment of a caretaker at that place, with whom the public might transact business relating to the transportation of passengers and freight, and that the defendant had not complied with the terms of the order, nor erected the depot building commanded, the judgment should be affirmed, and it is so ordered.

BURNETT, J., having heard this cause in the lower court, took no part at the trial or in the consideration hereof.

Decision No. 1426.

WASEY v. WHITCOMB.

(Supreme Court of Michigan. October 2, 1911.)

132 N. W. 572.

EVIDENCE — CHATTEL MORTGAGES — SALES — PRINCIPAL AND AGENT — BANKRUPTCY.

Where a written contract between a retail piano dealer and a third person proceeded on the theory that the title to pianos procured from manufacturers and paid for by the third person was in the latter, but did not show how the title was to pass to him, evidence of a prior oral agreement that the third person should take the place of the manufacturers, and that the dealer would buy the pianos and give a consignment receipt for them to the third person, was admissible to illustrate the meaning of the contract, without contradicting it.

A contract between a retail piano dealer and defendant provided that defendant, paying for pianos purchased by the dealer for himself, should consign them to the dealer for sale, and that the dealer should accept, on consignment, such pianos at prices and on conditions agreed on; that the dealer should report all sales and settle

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for cash sales immediately; that lien notes should be indorsed to defendant until the amount due for the instruments represented was settled, with interest; that the dealer's commission should be the amount for which instruments were sold in excess of the cost thereof, as represented by consignment receipts, reciting that the instruments should remain the property of defendant; and that the dealer should make all collections, and carry insurance to cover cost of instruments in stock, and to surrender to defendant, on thirty days' notice, unsold instruments held on consignment. Held, that the contract vested in defendant the title to pianos purchased from manufacturers and paid for, and was not a chattel mortgage to secure defendant; the term "to consign" meaning to transfer to a factor for sale, and the term "consignment" indicating title in the consignor.

The stipulation for commissions to the dealer did not prevent the contract from vesting title in defendant and to make the dealer his agent in selling pianos, for, in the absence of a special agreement, a factor is entitled, on the performance of services, to the customary commissions on the amount of goods sold, and commissions need not be on a percentage basis.

The fact that sales of pianos were made in the name of the dealer did not prevent the contract from vesting title in defendant; it being customary for commission merchants to sell in their own names.

That the dealer agreed to pay interest was not sufficient to make the transaction a chattel mortgage, for "interest" may include recompense for the use of anything that has an ascertained pecuniary value, as well as money.

The provisions of the contract that the dealer should repossess any instrument sold under agreement when deemed necessary, and to resell the same for an amount equal to the balance due, with interest, or, in default, to replace the same or any deficiency with cash, etc., applied only to cases where the purchasers of pianos failed to keep up payments, and the dealer found it necessary to repossess the instruments, and they did not make the contract a chattel mortgage.

The provision that the dealer should carry insurance did not make the contract a chattel mortgage, and prevent it from vesting in defendant title to pianos procured.

Where it is sought to show that an instrument, apparently a consignment contract, or bill of sale, is a chattel mortgage, it is competent to consider the circumstances under which the instrument is made, as well as the practical construction given to it by the parties in their dealings under the instrument.

Evidence of the practical construction placed by the parties on a contract between a retail piano dealer and defendant, who furnished the money to pay the makers for pianos bought by the dealer, held to show that the ontract was intended to pass title to the pianos to defendant, and to be merely a mortgage to secure advances.

The essentials of a chattel mortgage are the existence of a debt, legal liability, or obligation, and an intention to secure the same by some form of conveyance.

Though an instrument purports to be an absolute transfer of chattels, a defeasance may be proved by parol, and thus establish a chattel mortgage; but the evidence must be clear and convincing.

A retail piano dealer and a third person may enter into a contract whereby the third person shall pay manufacturers for pianos procured, and obtain title to them, to be sold by the dealer as agent; and the ignorance of the manufacturer does not affect the rights of the parties and those dealing with them.

Where a contract between a retail piano dealer and defendant furnishing the money to pay for pianos procured from manufacturers obligated the dealer to pay the price to defendant, and interest thereon, out of the first moneys collected on contracts of sale made by the dealer as agent, but, with the consent of defendant, the dealer retained the first money paid on contracts as his compensation for selling,

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and also appropriated to his own use money belonging to defendant, the court could compel the dealer to account for the amount of the misappropriation, and give the dealer credit for commissions provided for in the contract.

A trustee in bankruptcy has no other or greater rights than the bankrupt had when he became a bankrupt; and when a third person had at that time a right as against the bankrupt to a credit, he is entitled to assert such right in a suit by the trustee against him for an accounting.

Appeal from Circuit Court, Wayne County, in Chancery; Byron R. Erskine, Judge.

Suit by Edward G. Wasey, trustee in bankruptcy of James Vaughan, against Edgar B. Whitcomb. From a decree of dismissal, complainant appeals. Affirmed.

Argued before OSTRANDER, C. J., and BIRD, MOORE, BLAIR, and STONE, JJ.

Graves & Hatch, for appellant. Herbert C. Munro and Jasper C. Gates (William L. Carpenter, of counsel), for appellee.

STONE, J. We compile the following from the statement of facts in this case, made by complainant's solicitors. The bill of complaint is exhibited by the complainant in his capacity as trustee in bankruptcy of the estate of James Vaughan against the defendant. The purpose of the bill, as claimed by complainant, is twofold: First, to procure an accounting from the defendant for certain complicated business transactions between himself and the bankrupt, and thus secure certain money and property to which the bankrupt's estate is equitably entitled; and, secondly, to avoid certain conveyances made by the bankrupt to the defendant in the same business transaction, on the ground that they were, in substance and effect, conveyances intended to operate as chattel mortgages, and, never having been filed for record, were void as to creditors represented by complainant.

For a number of years prior to June 24, 1902, James Vaughan had been a retail dealer in pianos and other musical instruments in Detroit, having a storerom and warehouse on Woodward avenue, in that city, where he kept a stock of goods and conducted the business in his own name. In the course of his business Mr. Vaughan bought pianos and other musical instruments from the manufacturers thereof in his own name, sometimes for cash, and sometimes upon credit, and he also had on hand a quantity of pianos which certain manufacturers had consigned to him, to be sold for them upon commission. In the course of his business Mr. Vaughan frequently sold the pianos and other musical instruments under written contracts of so-called conditional sale, whereby the purchaser agreed to buy the piano from Mr. Vaughan and pay for the same in instalments, but Mr. Vaughan permitted the purchaser to have possession of the piano so long as the latter was not in default; Mr. Vaughan retaining the title to the piano until the same was fully paid for. These contracts of conditional sale are in this litigation termed "Piano Contracts." Mr. Vaughan had also in some instances, where he sold the pianos on commission, made

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contracts in the name of the manufacturer, retaining title in the manufacturer, as above indicated. In some instances, prior to June 24, 1902, Mr. Vaughan, after securing piano contracts in his own name, as above stated, was accustomed to sell the same to the defendant; the defendant paying therefor the face of the contracts, less an agreed discount; and Mr. Vaughan assigning the contracts, sometimes by a separate assignment, and sometimes by a written indorsement thereon, signed by him, and delivering the contracts to the defendant.

On June 24, 1902, a new arrangement was made between Mr. Vaughan and the defendant, which new arrangement was evidenced by the following instruments (Exhibit B and C), attached to the bill of complaint:

"Exhibit B.

"Memorandum of agreement made this 24th of June, 1902, between Edgar B. Whitcomb of the city of Detroit, Mich., herinafter known as the party of the first part, and James Vaughan of the same place, hereinafter known as the party of the second part. Whereby the party of the first part agrees to consign for sale and the party of the second part agrees to accept on consignment, for sale, pianos, organs and other musical goods, at the price and on the terms and conditions hereinafter agreed upon.

"First. All expenses incurred in selling said consigned instrument to be paid by the party of the second part.

"Second. All sales to be reported promptly and cash cales to be settled for at the time of settlement of sale.

"Third. All sales made on installments to be made on lien notes or contract forms drawn in the name of the party of the second part.

"Fourth. All contracts or lien notes accepted in settlement of sales to be indorsed by the party of the second part to the party of the first part until the amount due for the instrument it represents is settled for in full with interest, as provided at 6 per cent. from date of sale or after four months from receipt of instrument.

"Fifth. The amount of recompense or commission due party of the second part shall be the amount for which said instrument is sold in excess of the cost of said instrument, as represented by a consignment receipt given by the party of the second part to the party of the first part at the time of acceptance of said instrument on consignment bearing the name and number of said instrument, which receipt forms a part of this contract.

"Sixth. In case of any instrument or other property shall be taken in exchange in part payment of any piano or musical instrument represented in this agreement, said instrument or property shall be taken as recompense or commission by party of the second part, and in case the amount allowed for same shall be in excess of the amount due the party of the second part, then party of the second part agrees to pay party of the first part any excess in cash or acceptable contracts.

"Seventh. Party of the second part agrees to repossess any instrument sold under the agreement whenever deemed necessary, and to resell the same free of expense to the party of the first part, for an amount equal to the balance of the principal and interest remaining due on said instrument or in default replace the same or any deficiency with cash or acceptable contract.

"Eighth. Party of the second part agrees to make all collections free of expense to party of the first part and report same whenever requested to do so, and in case of undue neglect or default in making said collections said party of the second part agrees to allow party of the first part any expense incurred in making said collections.

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"Ninth. Party of the second part agrees to make report of all stock on hand or in prospective customers' hands whenever requested to do so.

"Tenth. Party of the second part agrees to carry at his expense sufficient insurance against fire to cover cost of instruments in stock at all times, for the protection and benefit of the party of the first part.

"Eleventh. Party of the second part agrees to surrender to the party of the first part or his authorized agent, on thirty days' notice all unsold instruments, held on consignment under terms of this agreement, and to deliver same to any address he may designate in the city of Detroit free of expense to the party of the first part.

"Twelfth. All contracts or lien notes taken under this agreement by the party of the second part are guaranteed by the party of the second part, and in case of unreasonable default on the part of any purchaser, the instrument represented shall be repossessed and resold by the party of the second part free of expense to the party of the first part, for a sum equal to the amount remaining due to party of the first part, with accrued interest thereon; in default the same shall be paid in cash or other acceptable contracts. Edgar B. Whitcomb. James Vaughan."

"Exhibit C.

"Detroit, Sept. 30, 1902.

"Received of E. B. Whitcomb one piano and ..... as per list below, of the value of $....., said instrument to be sold for E. B. Whitcomb, and the sum of $..... to be paid therefor, with interest at the rate of ..... per cent. per annum after four months from above date, or if sold before four months said interest to be from date of sale.

"Said instrument is to remain the property of said E. B. Whitcomb, and any contracts given for the sale of same to be the property of said E. B. Whitcomb, until this amount is paid in full. [Signed] James Vaughan."

At this time Mr. Vaughan had on hand some pianos which he had purchased of various manufacturers, and also certain pianos which had been consigned to him by the manufacturers thereof. From and after June 24, 1902, Mr. Vaughan and defendant did a large business with each other pursuant to this new arrangement, and Mr. Vaughan bought a large number of pianos and other musical instruments from the various manufacturers thereof upon credit; and the defendant in each case advanced a sum of money equal to and intended by the parties to cover the purchase price of some particular piano or musical instrument already purchased by Mr. Vaughan, and the latter, in each case, at the time of the advancement or shortly after, executed and delivered the consignment receipt, a form of which is given in Exhibit C. Mr. Vaughan proceeded to make sales of the numerous pianos covered by these consignment receipts (in most cases the sale being made in the form of piano contracts) to his various customers, and he proceeded to the collection of the amounts due upon these piano contracts. Mr. Vaughan was permitted to retain the first moneys collected upon each piano contract, instead of paying the same over to the defendant, so that actually in most cases, if not in all cases, Mr. Vaughan, instead of the defendant, secured the first money collected from each piano contract.

In most cases Mr. Vaughan purchased the pianos and musical instruments in his own name, and in no case delivered actual possession thereof to the defendant, but retained possession thereof until sold by

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him to his customers; and the sales were in all instances made in the name of Mr. Vaughan. The piano contracts were made in his name as were the collections. Neither the agreement of June 24th, nor any of the consignment receipts, were ever filed for record in the office of the clerk of the city of Detroit, pusuant to section 9523, Compiled Laws of 1897. Mr. Vaughan kept a book called the "Piano Register," in which he entered, under the name of the manufacturer, the name and number of each piano purchased, and the cost price. In this book he entered, in red ink, the letter "W" before the name of each piano in which defendant was interested, at or about the time defendant advanced money thereon. He also kept two accounts on his books with defendant, one styled "E. B. Whitcomb Stock Account," and one styled "E. B. Whitcomb Contract." In the former account he credited defendant with all money received from defendant, and charged defendant with each particular piano, by number and price, which came under the contract. In the latter account he credited defendant with all money collected on contracts which defendant owned absolutely, and charged him with all money paid him.

A regular intervals after June 24th, 1902, Mr. Vaughan rendered a statement of the pianos and contracts on hand, and the amounts collected, and these statements were used by the parties for the purpose of striking a balance in their accounts. In these statements defendant was always credited with interest on the money advanced by him, evidenced by consignment receipts.

Shortly before October 18, 1904, defendant, for the first time, became aware of the fact that Mr. Vaughan was insolvent, and defendant, on the latter date, procured from Mr. Vaughan a bill of sale of all of the stock of pianos and other corporeal personal property used in the business, wherever located, belonging in whole or in part to or owned by Mr. Vaughan, and all the accounts receivable upon contract and incorporeal personal property arising out of the business to the extent of Mr. Vaughan's interest therein. This bill of sale was placed upon record as a chattel mortgage. Another paper was simultaneously executed by Mr. Vaughan and defendant, reciting the fact that defendant had advanced money to Mr. Vaughan for the purpose of purchasing certain pianos, and had taken title to the same in his own name, and that Mr. Vaughan had sold the pianos and failed to account to the defendant therefor, and had also, as agent of defendant, collected money on piano contracts held by defendant and failed to account for the same, and that the consideration for said bill of sale was the indebtedness aforesaid. This latter agreement was not recorded. Defendant immediately took possession of all of the property covered by the bill of sale. A few days later Mr. Vaughan executed to defendant an assignment in writing of all of the piano contracts, including those on the June list.

Upon October 27, 1904, a petition was filed in the District Court of the United States for the Eastern District of Michigan, Southern Division, in bankruptcy, by certain creditors of Mr. Vaughan, to have him adjudicated a bankrupt, with the result that, on November 7, 1904, Mr. Vaughan was adjudicated a bankrupt, and on November 29, 1904, the complainant was duly appointed trustee in bankruptcy for Mr. Vaughan; and, having qualified as such, upon November 30,

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1904, has ever since continued to act as such trustee in bankruptcy, and filed the bill of complaint in the present case on May 18, 1907.

All the property covered by the bill of sale, and not covered by the consignment receipts, was surrendered to the complainant. Whatever name may be given to Mr. Vaughan's interest in the pianos and piano contracts covered by the consignment receipts, whether equities, as complainant contends, or commissions, as defendant contends, it is the claim of complainant, was covered by the bill of sale of October 18, 1904.

There is some criticism by defendant of complainant's statement of facts, but what is in litigation here ought not to be much in question, in view of the announcement made by one of complainant's solicitors, while taking testimony in this case. That statement was as follows: "Mr. Graves: We are making no claim against Mr. Whitcomb by virtue of this bill of complaint for any money or property, except money, or except pianos or piano contracts, for which consignment receipts were given to him by Mr. Vaughan in the manner that has been disclosed here in this case so far."

To show what the circuit judge considered as the question in issue in this case, we quote the following language from his written opinion: "The complainant contends that the contract of June 24, 1902, and the consignment receipts and the business dealings between the parties operated as a chattel mortgage on the pianos to secure advancements made by defendant to Vaughan, and the performance by the latter of his agreement to sell the pianos and repay to the defendant the amount of the advancement, with interest, and that these instruments, not being filed in the office of the city clerk, and certain creditors of Vaughan having in the interval extended credits or renewed their indebtedness they were entitled to attack the transaction as fraudulent. Defendant, on the other hand, contends that the title to the pianos actually vested in the defendant, and that the instruments were not intended, and did not operate, as chattel mortgages. Passing by the serious question raised by defendant as to the right of the complainant to maintain the bill, it is my conclusion that it was the intention of the parties that the title to the pianos and the piano contracts in question should be in Whitcomb. This is borne out by their subsequent transactions, practically construing the relations between them. This being so, and it appearing that defendant has turned over to the trustee the property covered by the bill of sale, not affected by the consignment receipts, I conclude that complainant is not entitled to further relief." And the decree dismissing the bill proceeds upon the same theory. The complainant has appealed.

From a statement of the case made by one of defendant's counsel, it is said that the defendant received possession of these contracts from the bankrupt for whom complainant is trustee, and appropriated the same to his own use, under the claim that he was the owner of them, and that the trustee brings this suit to obtain their value, claiming: (a) That defendant's only title to the property was an unrecorded chattel mortgage, void as against the creditors represented by him; and (b) that, even if defendant owned the contracts, Vaughan had an equity therein, for which defendant must account.

It is clear to us that the first question for us to determine is whether

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the defendant's interest or title was that of an owner or mortgagee. There is no doubt, from the record, that under the course of business under the contract and consignment receipts Mr. Vaughan was permitted to use the first money paid on the piano contract to reimburse himself, but it is important to note that he went beyond this, and appropriated to his own use $7,698.03 of the money belonging to defendant. The details of this misappropriated money are shown by certain exhibits in the record. So that, had Mr. Vaughan paid over the money that was due to the defendant, there would have been some equity due to Mr. Vaughan growing out of the contracts. But the evidence is undisputed, not only that Mr. Vaughan had collected and retained all that would ever have been his, had he fully performed his whole contract as to these pianos, but that he collected and appropriated the above-named sum which belonged to the defendant, and which he had failed to turn over. There is one more item which may as well be noted in this connection. In the record one of complainant's solicitors stated as follows: "Mr. Whitcomb did turn over to Mr. Wasey everything, except that which Mr. Whitcomb claimed to own by virtue of having these consignment receipts, except that one Fischer piano. We left that out altogether." This, we understand, is the piano, the value of which ($130.50), defendant, pending suit, paid into court. This brings us to the consideration of the contract and consignment receipts.

(1) It will be observed that the written contract between the parties proceed upon the assumption that the title to the pianos is in defendant. Just how this title was to become defendant's is not stated in writing, but that subject was covered by an oral agreement made before the writing was signed, which we think it proper to consider in this connection. Mr. Whitcomb testified as follows: "He [Vaughan] said that there were some pianos that he could not buy; some manufacturers who manufactured very good and cheap pianos, but they did not sell them on consignment, and he would like to get some. He could not pay for them in cash, and he wanted to know if I would not take the place of the manufacturer, and buy these pianos and consign them to him, as others were doing at the time." Upon cross-examination of Mr. Vaughan, who was a witness for complainant, this occurred: "Q. Isn't it a fact, Mr. Vaughan, that right at the time [June, 1902] when you made that agreement that it was stated between you and Mr. Whitcomb both ways, that Mr. Whitcomb should come in and take the place of the manufacturer, and have the manufacturer's rights, so far as you were concerned, and, among other things, get the $15 charged by the manufacturers for credit? Wasn't that the understanding at the time you made your contract at the very beginning? A. Yes." While the court below thought testimony of this nature objectionable, because it was a substitution of an understanding for the written contract, we think it important as illustrating the meaning of the contract, and in no way contradicting it. It explains the manner in which defendant became the owner of the pianos. This is shown by the following testimony of the defendant: "Q. Now, after this contract was made, state to the court the method of doing business under it. A. Mr. Vaughan would either telephone me or come and see me, and state that he had some pianos that he wanted

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to pay for; and either when he came, or the next day after coming or telephoning, he would bring down a consignment receipt covering these pianos, and I would give him a check for the amount necessary to pay for them." Also by the following testimony of Mr. Vaughan: "In the first place I ordered these pianos from the factory myself. Some time after they arrived I would take the bill of the piano to Mr. Whitcomb, and the consignment receipt for the piano giving him the title, and get his check for the amount of money, with the excess of $15 on each instrument. Then I remitted that money to the manufacturer and took his receipt."

After carefully reading this record, we can say, in speaking generally, that this was the method under which these pianos were bought; that is, defendant advanced the money to pay for particular pianos, took consignment receipts in the form of Exhibit C, above specified; the amount written therein being $15 on each piano more than the amount paid for it. That there was a deviation from this method in the larger transaction in the fall of 1902 is undisputed. At that time Mr. Vaughan had in his store, on consignment, large number of pianos belonging to the Starr Piano Company. The Starr Piano Company owned also a number of contracts similar to contract Exhibit B, in which Mr. Vaughan had an equity representing his commissions. It was arranged between defendant and Mr. Vaughan that the former should advance the money necessary (between $20,000 and $25,000) to enable Mr. Vaughan to settle up with said Starr Piano Company. This amount was accordingly advanced, the Starr Piano Company settling at a discount on the pianos; and the piano contracts covered by that deal came under the operation of the written contract; Mr. Vaughan giving defendant consignment receipts therefor as provided in the contract. In pursuance of this plan and under said written contract, Mr. Vaughan bought and sold a large number of pianos, many more than those involved in this suit. It appears, however, that the plan above agreed upon was departed from in a few instances. There were some instances where Mr. Vaughan had himself bought and paid for the pianos before getting defendant's money. In these cases, however, as in others, Mr. Vaughan, at the time of getting the money or immediately thereafter, gave the usual consignment receipts. According to complainant's argument, in many instances it is conceded that Mr. Vaughan's payment was made very shortly before he obtained the money from the defendant; and the record tends to show that where Mr. Vaughan paid by checks in some instances they were not paid until he had received the money from the defendant, so that in reality defendant's money paid for those pianos.

There is an instance occurring in February, 1904, that is somewhat exceptional. At that time the wife of defendant was ill, and he had to accompany her South for an indefinite time. Before going he arranged with Mr. Vaughan that during his absence the money coming in on his accounts might be used by Vaughan to purchase pianos. After defendant's return in April, Mr. Vaughan made a report to him that he had, during his absence, collected $2,531.26, and that he had expended of this amount $2,432.50 in purchasing pianos. He gave defendant a check for the difference, and also gave him consignment receipts for

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the pianos which defendant supposed he had bought. It results that there were a few instances in which Mr. Vaughan did not use the defendant's money in making purchases, and in those instances the defendant accepted the consignment receipts believing that Mr. Vaughan had, in accordance with his agreement, purchased the pianos receipted for with defendant's money.

We will now notice some of the claims made by complainant as to the legal effect of the contract and consignment receipts. Among other things, complainant's counsel contend that under the contract defendant's only interest in a piano was the amount of advancement, with interest, and that Mr. Vaughan had the right at any time, upon repayment to the defendant of the amount of his advancement, with interest, to thus extinguish all of the defendant's interest in the piano. We cannot agree with these propositions. It seems to us clear that under the terms of the agreement the defendant owned those pianos, and that Vaughan was to sell them for him as his agent, and that defendant was entitled to have each piano contract stand until the purchaser paid up, so that he should have interest on his money during that period. In other words, that the defendant owned the contracts, and was not bound to sell them to Vaughan, or any one else. It is a familiar principle that an agent to sell may not sell to himself. By the agreement, the defendant agreed to "consign for sale," and Vaughan agreed "to accept on consignment for sale, pianos, organs and other musical goods at the price and on the terms and conditions hereinafter agreed upon." "To consign," in mercantile terms, is ordinarily to send or transfer goods to a merchant or factor for sale, and the consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted, and the term implies an agency. The very term "consignment" means title in the consignor. Dittmar v. Norman, 118 Mass. 324; 6 Am. & Eng. Encyc. of Law (2d ed.) 798. This indicates to our mind that the defendant was to be the owner of the instruments, and that Mr. Vaughan was to deal therewith as defendant's agent. And this appears by other portions of the same contract. By the second paragraph of the contract Vaughan is required to report all sales promptly, and settle for cash sale immediately. By the fourth paragraph, all contracts and lien notes accepted in settlement of sales were to be indorsed by Vaughan to the defendant, until the amount due for the instrument it represented was settled for in full, with interest as provided. The fifth paragraph provides that Vaughan's recompense or commission should be the amount for which said instrument was sold in excess of the cost of said instrument, as represented by a consignment receipt given by Vaughan to defendant, which receipt formed a part of the contract. By the eight paragraph Vaughan agreed to make all collections free of expense to defendant, and to report the same, whenever requested so to do. By the ninth paragraph Vaughan agreed to make report of all stock on hand, or in prospective customers' hands, whenever requested to do so. It seems to us that none of these provisions can be given force or effect, unless defendant is held to be the owner, and Vaughan to be acting as a mere agent to sell.

Complainant's counsel also contend that the defendant, although claiming to be the owner, had no power to extinguish Vaughan's

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interest in the piano, for the latter might retain possession thereof, and have the right to sell the piano for any price he deemed fit, and Mr. Vaughan's so-called "commissions" were not measured as commissions always are, by a percentage upon the purchase price, but his commissions were all he could get for the piano over and above the defendant's advancement, with interest. We think it already appears that Vaughan was not at liberty to sell for any price less than that specified in the consignment receipt. And counsel's statement that defendant had not power to extinguish Mr. Vaughan's interest in the piano we cannot accept, in view of the eleventh paragraph of the contract, which provides that: "Party of the second part agrees to surrender to the party of the first part or his authorized agent, on thirty days' notice all unsold instruments, held on consignment under the terms of this agreement, and to deliver same to any address he may designate in the city of Detroit free of expense to the party of the first part." In other words, defendant, on thirty days' notice, might at any time absolutely terminate Vaughan's possession of and claims in every unsold instrument in Vaughan's possession.

Neither can we accede to the proposition that commissions are always or usually on a percentage basis. Under the title, "Factors or Commisison Merchants" (12 Am. & Eng. Encyc. of Law [2d Ed.] 669), appears the following: "Amount of compensation. In the absence of a special agreement, a factor is entitled, upon the performance of his services, to the usual and customary commissions upon the amount of goods sold." It is true that in all his dealings as agent of various piano manufacturers Mr. Vaughan received all he could get over and above the amount stated in the consignment, or bill, as the purchase price. Moreover, it appeared in the evidence of various experts called upon this subject that this was the customary compensation or commission of piano agents everywhere.

We do not consider it significant, as tending to favor complainant's position, that all sales were made in the name of Mr. Vaughan, or that in the sale the defendant was not treated as the owner of the piano. We understand it is usual and customary for commission merchants to sell in their own names. 12 Am. & Eng. Encyc. of Law (2d Ed.) 633, and authorities cited. In Slack v. Tucker, 23 Wall. 321, 23 L. Ed. 143, Bradley, J., speaking for the court, said: "The difference between a factor or commision merchant and a broker is stated by all the books to be this: 'A factor may buy or sell goods in his own name, and has the goods in his possession.'"

Again, it is contended by complainant's solicitor that the fact that Vaughan agreed to pay interest shows that the transaction was a mortgage, and counsel say: "The obligation to pay interest distinctly stamps the advancement as a debt from Mr. Vaughan to the defendant, because if the defendant was buying the piano from Mr. Vaughan, and the advancement was the purchase price, Mr. Vaughan would not be paying interest on the advancement. No one pays interest, except upon a debt or obligation he owes." In Starr Piano Company v. Morrison, 159 Mich. 583, 124 N. W. 562, under an agreement very similar in its terms to the one we are considering, provision was made for the payment of interest, and yet that instrument was held not to be a chattel mortgage. Interest may include recompense for the use of

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anything that has an ascertained pecuniary value, as well as money. We think it may be gathered from the following authorities in this State that Vaughan's agreement to pay interest is not sufficient to make the transaction a chattel mortgage. Ryan v. Wayson, 108 Mich. 519, 66 N. W. 370; Stack v. Olmsted, 127 Mich. 359, 86 N. W. 851; Bunday v. Columbus Machine Co., 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475; A'Hern v. Lipsett, 154 Mich. 196, 117 N. W. 577. In every one of these cases interest was required to be paid to the seller, but it was nevertheless held that the title did not pass.

Complainant further contends that under the seventh and twelfth paragraphs of the contract Vaughan was bound to make good to defendant any deficiency that might result in the repayment to defendant of the amount of his advancement, with interest, in case the sale of the piano resulted in such deficiency. An examination of these paragraphs will show that they apply exclusively to cases where the first purchaser of the piano failed to keep up his payments, and Vaughan found it necessary to repossess the instrument, and we do not think the statement of counsel is justified. But, if Vaughan had made himself liable for the purchase price of the instrument, upon the mere contingency of the purchaser failing to make his payments according to contract, this circumstance would by no means have been inconsistent with defendant's ownership of the instrument, and Vaughan's agency in dealing therewith. It would have been a mere instance of the ordinary del credere agency. In 9 Am. & Eng. Encyc. of Law (2d Ed.) 182, 183, appears the following: "The term 'del credere' is applied to a contract whereby an agent or factor, in consideration of an increased commission, absolutely engages to pay to his principal the price of goods sold by him, when the term of credit given to purchasers has expired, thus relieving the principal of all risk or loss on such sales in case the purchasers fail to pay."

Neither do we consider the fact that Vaughan was required to carry insurance upon the pianos as of any significance. This is one of the ordinary duties of the factor or commission merchant. 12 Am. & Eng. Encyc. of Law (2d ed.) 656, 657. Taken as a whole, in our opinion, the meaning of Exhibit B is in no way doubtful. It shows that the title to the pianos was vested in the defendant, and in him only. There is not even a semblance of a defeasance clause in the instrument. The circumstances under which the agreement was made, the fact that a form was used, which is similar to that which had been used by the Starr Piano Company, is significant as tending to show, not only how business of this nature had been carried on, but how it was intended to be carried on in this instance. We have already referred to the case of Starr Piano Company v. Morrison, supra.

There is much evidence in the record, consisting of oral testimony, which gives a practical construction to Exhibit B, as shown in the numerous dealings between the parties; and considering Exhibits B and C together, and the fact that there is no defeasance clause found within the four corners of either of the instruments, we may well look into the testimony of the parties who made the instruments, to determine what construction they gave them. In the testimony of the witness Vaughan appears the following: "Q. That instrument states that Mr. Whitcomb is to be the owner of the pianos substantially, and that you are to sell them on commission; what is the fact as to

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whether that was a true representation of your relations, as you then understood them? A. Yes, sir. . . . Q. I want to get the run of this business. What was your course when Mr. Whitcomb paid for the piano? The stipulation says that you charged him with the price of the piano, and credited him with the money paid, on your book; was that the way you carried on that business? A. Yes, sir. Q. Was this course followed in reference to all the pianos with which you dealt, under the consignment receipt arrangement? A. Yes, sir. Q. Now, I will ask you what was the understanding between the parties — what was your understanding as to whether Mr. Whitcomb bought these pianos, and paid the money to pay for them, or whether he loaned you money and took security on the pianos? . . . A. In the first place, I ordered those pianos from the factory myself. Some time after they arrived I would take the bill of the piano to Mr. Whitcomb, and the consignment receipt for the piano, giving him the title, and get his check for the amount of money, with the excess of fifteen dollars on each instrument. Then I remitted the money to the manufacturer, and tok his receipt. After I got the — Mr. Graves: The receipts ran to you? A. Yes; in most cases. When I received those receipts I would hand them to Mr. Whitcomb. . . . Q. Here is a question I want to put to you: Was it the purpose, in giving that consignment receipt and taking the pay for the piano, to make him the owner of the piano, or were you giving him security? . . . A. I intended to sell him the piano. Q. Afterwards, in dealing with this piano, did you have any interest in it, except your commission — the commission measured by the difference between the amount mentioned in the consignment receipt and the amount that you sold the piano for and collected? . . . A. No. Q. In selling a piano, what is the fact as to whether you understood that you were acting on your own account, or acting as agent, in the same way you acted, for instance, for the Starr Piano Company on their consigned pianos? . . . A. I considered it the same kind of a deal, and acted in the same way. Q. In what way was that? A. To sell the piano and take the profit over and above the cost. . . ."

We have already quoted somewhat from the testimony of the defendant. Without repeating what we have already quoted, we insert the following taken from his testimony: "Q. At whose suggestion was this contract of June 24, 1902, entered into; who first brought the matter up? A. Do you mean the making of the contract, or the proposition? Q. Yes. A. Mr. Vaughan suggested the idea of my purchasing pianos." (This follows the language which we have already quoted.) Witness continues: "The arrangement between Mr. Vaughan and myself came about in this way: I had a considerable sum of money coming into my hands at that time from the sale of some Edison Electric Light stock, and Mr. Vaughan knew about it. It seemed to be mutually desirable to extend the arrangement, and for that reason Mr. Vaughan saw the Starr Piano people. About the Starr Piano Company and its contracts. Mr. Vaughan told me he had a very large number of contracts in their hands in which he had equities, and also that the entire stock on his floor was consigned to him by the Starr Piano Company. He told me he thought he could get a lower price by settling up all those matters, and could make it worth my while to

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take the place of the Starr Piano Company in those various transactions. I did not see any of the officers of the Starr Piano Company in connection with that deal at that time. I know that Mr. Vaughan went to Richmond, Ind., to see them about it. He reported to me that the Starr Piano Company had offered him a substantial reduction for the settlement of his entire account with them, and he made me the proposition to take it over."

There is nothing in this record which we have been able to discover that throws any doubt upon the truthfulness of the testimony of the witness above quoted. In such a case as this, we think it competent, under our numerous decisions, where it is sought to show that the instrument, apparently a consignment contract, or bill of sale, is really a chattel mortgage, to consider the circumstances under which the instrument was made, as well as the practical construction given to it by the parties in their dealings under the instrument. Cornell v. Hall, 22 Mich. 377; Sowles v. Wilcox, 127 Mich. 166, 86 N. W. 689; Carveth v. Winegar, 133 Mich. 34, 94 N. W. 381.

From the stipulation of facts, we extract the following: "Vaughan kept a book called the 'Piano Register,' in which he entered under the name of the manufacturer, the name and number of each piano purchased, with the cost price. In this bok he entered in red ink the letter 'W' before the number of each piano in which Whitcomb was interested. Vaughan kept an account with Whitcomb in his ledger, styled 'E. B. Whitcomb Stock Account.' In this account he charged Whitcomb with each particular piano, by number and price, in which Whitcomb was interested, and credited Whitcomb with all money received from Whitcomb. Vaughan also kept an account, styled 'E. B. Whitcomb Contract,' in which he credited Whitcomb with all moneys collected on contracts in which Whitcomb was interested, and charged him with all moneys paid to Whitcomb from such collections. These two accounts include all pianos and piano contracts involved in this suit." "Vaughan kept a book styled a 'journal,' that related solely to pianos and piano contracts in which Whitcomb was interested. In this book are entered all the pianos and piano contracts involved in this suit, with the date when Whitcomb became interested in the pianos, the date of each contract, and the name of the purchaser. He also kept another bok, styled a 'ledger,' in which were entered all contracts relating to each and every instrument in which Whitcomb was interested, and an account in detail of the payments and interest charges, and amounts due from time to time as to each contract. The accuracy of Vaughan's books not conceded for purposes in this case by either party. . . ." It is significant that thus, by the contract of the parties, and by their conduct, it may be said that th eintention of the parties was to vest in the defendant the title to the pianos in question in this case. Through all the dealings between these parties it would seem that their manner of bookkeeping was inconsistent with any hypothesis, except that defendant owned the instruments, and that Vaughan was merely his agent in dealing with them. Through all the dealings, their practice was for Vaughan to report these collections substantially once a week, and corresponding entries were then made by the defendant in his books. Frequent statements were made between the parties, always upon the basis that

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defendant owned the pianos and piano contracts, and that Vaughan had nothing in them, except his commisisons.

A further extract from the testimony of defendant explains the manner of settlement: "I had settlements from time to time with him. In practice between Mr. Vaughan and myself, the first money collected on the consigned pianos he got. He got the money until his commissions were all received. Q. We will suppose here are a dozen, more or less, contracts, in which he had substantially collected his commisison, some a little more and some a little less; how was that matter settled up between you? A. He rendered me a statement of the contracts and the amount due on each, with the interest computed to date, and made a statement of the purchase price of the pianos, including the fifteen dollars and the interest upon the purchase price from the time the contract was made with the other parties — the time the property was sold on contract to the purchaser." (This is illustrated by certain exhibits offered in evidence.) Witness continues: "They were made and brought to me by Mr. Vaughan about the time they bear date. As I find the transaction on my books, I credited the account with the consigned pianos, and charged Mr. Vaughan with the same amount. On each contract I think I always had the usual paper assigning them to me, guaranteeing the value of the contract at the time; and that was attached to the contract from that time forward. Mr. Vaughan made the collections from the purchasers." In other words, as soon as Mr. Vaughan had received his commisisons upon the piano contracts his interest therein ceased, and the same were turned over absolutely to defendant. Certainly this manner of dealing was not the one that would have been pursued had this instrument been intended to be a chattel mortgage to secure loans. The dealings of the parties show that, as between them, defendant was understood to be the owner exactly as he is stated to be, both in the contract of June 24, 1902, and the consignment. The foregoing course of dealing, including the book entries and the contract existing between the parties, is amply sufficient to vest the title of the pianos and piano contracts in defendant. Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

In the face of this practical construction, carried into effect by the parties themselves, in scores of instances covering the whole period of their dealings, which dealings were in entire harmony with the written agreements between them, we do not see any reasonable theory upon which we should place a construction upon them directly antagonistic to their terms. Further than this, we think that the contract (Exhibit B) and the consignment receipts lack the essentials of a chattel mortgage. In Jones on Chattel Mortgages, § 32, the author says: "A vendor who alleges that his absolute bill of sale was intended only as a mortgage must make strict proof of the fact. Having given the transaction this form, he should be bound according to its terms, until he shows by evidence, clear and convincing, that both parties intended it should have a different effect, and that it does not express their real contract." In 20 Am. & Eng. Encyc. of Law (2d ed.) 898, 899, we quote the following: "The essential characteristics of a mortgage are that there is a debt, legal liability, or obligation actually existing at the time of its execution, or contemplated at such time and afterwards

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actually incurred, and intention to secure that debt or obligation by some form of conveyance and agreement." Snook v. Davis, 6 Mich. 156. The above case in some of its facts is very similar to the case at bar. Starr Piano Company v. Morrison, supra. And as to the proof required to show that an absolute transfer is a mortgage, see Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. 265; Tilden v. Streeter, 45 Mich. 533, 8 N. W. 502; Rathbone v. Maltz, 155 Mich. 306, 118 N. W. 991.

We do not doubt the doctrine that a defeasance may be proved by parol evidence, although the instrument purports to be an absolute transfer, and counsel for complainant cite cases in support of this doctrine. But in this case we have been unable to find any evidence, either oral or written, that even tends to establish such defeasance. Every witness who had a knowledge of the intention of the parties has sworn that an absolute title passed, and such, we think, is the fair legal effect of every document produced.

We have examined with care the numerous cases cited by complainant, and think that they can be easily distinguished from the instant case. In the cases cited the evidence clearly showed that there was an indebtedness, and that the instrument in question was intended as security for the indebtedness. This element is entirely wanting in the case we are considering. In the face of the written agreement between the parties, by which the title to each piano or piano contract was vested in defendant, in spite of their conduct, showing a practical construction inconsistent with any other theory, and opposed to their positive testimony, we are asked to hold that Mr. Vaughan was at all times the owner of these instruments and piano contracts, and that defendant was a mere mortgagee. We must decline to so hold. The defendant has paid in cash the purchase price of every instrument involved in this controversy. Out of his moneys the manufacturers have received their compensation for making the instruments. As to most of the pianos in question, Vaughan was never the owner as between him and defendant.

In the few instances where the contracts had been made before the dealings with the defendant, this was not true, but why should a different rule be applied to those contracts? These pianos were then in the hands of purchasers, who might make default. We see no reason why they might not come under the operation of this contract, and be legally treated as they were in fact treated by the parties. The defendant by such transaction clearly acquired the title which Mr. Vaughan and himself intended he should acquire. In our opinion the title was intended to be that of an owner, and not that of a mortgagee. If it be competent, and it certainly is, for a dealer like Mr. Vaughan to make the written contract made in this case with the original manufacturer of the pianos, what ground is there for contending that an investor like defendant may not stand in the shoes of the manufacturer? Had defendant dealt directly with the manufacturer, and had the goods consigned to himself, instead of to Mr. Vaughan, no one would have questioned the transaction. Had the manufacturer been informed of the arrangement between defendant and Mr. Vaughan, no one would have questioned it. The ignorance of the manufacturer who gets his cash for the goods is utterly immaterial under the circumstances, for he is in no way prejudiced by the secret arrangement between Mr.

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Vaughan and defendant. As to every one else, except that manufacturer — the general creditors of Mr. Vaughan and the other dealers of whom he purchased — the transaction is in all respects the same as if Mr. Vaughan held the pianos on consignment from the manufacturer. We see no reason why this same rule should not apply to the exceptional instances in this case. In some of those instances it will be remembered that defendant accepted the consignment receipts, believing that the pianos receipted for were new pianos purchased with his money. We think that those transactions are controlled by the same rule of law that controls the others. The deception practiced upon defendant by Mr. Vaughan should not lessen defendant's rights. The mere fact that the title was in Mr. Vaughan was, as we have above said, immaterial. Most certainly Mr. Vaughan might have sold to defendant a particular piano, or any number of pianos, at that time owned by him (Vaughan), and arranged that he should sell them as defendant's agent. Of course, there is in such a case, by reason of section 9520, Compiled Laws, a presumption of bad faith, because there is no change of possession; but that section has no application here, and its application is not invoked by complainant. Complainant does not seem to question, and we think the evidence establishes, defendant's good faith. We conclude, therefore, that the complainant in this case has no such interest in the property as to enable him to contend that defendant's only title to the property in question arises from an unrecorded chattel mortgage. In our opinion defendant's title was that of ownership, and not of mortgagee.

(2) There is no doubt that some of the contracts in this suit are greater in value than the purchase price of the pianos; but in this we do not think the complainant can gain any advantage. This claim might be asserted if the written contract had been performed as between the parties, but it was not performed. The written contract obligated Mr. Vaughan to pay the purchase price to defendant, and the interest thereon, out of the first moneys collected on the contract. Had this plan been carried out, it would have followed that, after defendant received his pay Mr. Vaughan would have had an equity in the contract, but that plan was not carried out. By the consent of defendant Mr. Vaughan used the first money paid on the piano contracts to reimburse himself. More than that, he went beyond this and appropriated to his own use upwards of $7,000 of the money belonging to defendant. It would be most inequitable to deny the defendant the right to pay the commissions not collected by Mr. Vaughan by crediting them against this overdraft; and unless forbidden to do so by some rule of law, a court of equity should permit this to be done. So far as this claim is concerned, the complainant stands in the attitude of seeking an accounting under the contract, as the claim rests upon the contract. He claims that under that contract certain commisisons were due to Mr. Vaughan for which defendant must acount. It seems to us too clear for argument that in determining that account a court of equity will consider Mr. Vaughan's obligations to the defendant, arising from the same contract. Let it be granted that under the contract defendant owed Mr. Vaughan several hundred dollars for commisisons; it is clear that under the same contract Mr. Vaughan owed defendant several thousand dollars, growing

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out of collections for which he did not account. Had Mr. Vaughan brought this suit before he became a bankrupt, and before he turned over or assigned the contracts to defendant, is it not clear that in an accounting he would have been compelled to give defendant credit for the $7,698.03 which he had misappropriated? Would the court in that case have given Mr. Vaughan a decree for the amount of his commissions, and given defendant a decree for the money misappropriated, and have permitted Mr. Vaughan to enforce his decree without compelling him to satisfy defendant's decree? We think not. But one decree would have been made, and that a decree in defendant's favor for the balance his due.

The fact that Mr. Vaughan became a bankrupt, and that the suit is commenced and prosecuted by his trustee, rather than by himself, is, in this regard, we think, entirely immaterial. The trustee has no other or greater rights than Mr. Vaughan had when he became a bankrupt. He succeeded to Mr. Vaughan's rights; he did not acquire additional rights; and, as defendant had a right as against Mr. Vaughan to credit the amount due him (Vaughan) for commissions against the amount owing by him on the contract, we think he has that right yet, and may assert it in this suit. This view of the case renders it unnecessary to consider the other questions presented.

The decree of the Circuit Court is affirmed, with costs.

Decision No. 1427.

NELSON v. BRASSINGTON.

(Supreme Court of Washington. July 14, 1911.)

116 Pac. 629.

CONTRACTS — CONSIDERATION — GOOD WILL.

In the absence of fraud or overreaching, the courts will not inquire into the adequacy of the consideration of a contract, but will only inquire into its legality.

A bill of sale of a business recited that in consideration of a specified sum paid, the seller sold his butcher business and fixtures and tools located in a store room and that the seller would not enter into such business within twelve blocks of the building for two years. Held, that the consideration paid was a consideration for the sale of the business and fixtures, and for the agreement not to enter into a competing business.

A stipulation in a bill of sale of a business that the seller will not engage in a competing business within a limited territory for a limited period of time, is not contrary to public policy, but will be enforced to enable the seller to sell his business at full value, and to enable the purchaser to obtain the personal favor of the seller.

An owner of a butcher business sold the business and fixtures in storeroom, and agreed not to enter into such business within twelve blocks thereof for two years. Within the prohibited area and time he advertised a butcher business as his own, to be carried on under his name, followed by the word "manager." No one else publicly appeared as having any interest in the business. Held, that there was a breach of the agreement.

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Department 1. Appeal from Superior Court, King County; D. H. Carey, Judge.

Action by Charles Nelson against James Brassington. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Higgins, Hall & Halverstadt, for appellant. Faben & Kelleran, for respondent.

FULLERTON, J. On and prior to July 27, 1909, the respondent Brassington owned and operated a butcher business in one of the outlying districts of the city of Seattle, and on the date named sold the same to the appellant Nelson, executing and delivering to him the following bill of sale and contract:

"Know all men by these presents, that James Brassington, of Seattle, the party of the first part, for and in consideration of the sum of seven hundred fifty ($750.00) dollars, lawful money of the United States of America, to them in hand paid by Charles Nelson, of same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, the butcher business consisting of all the fixtures, tools, racks, scales, etc., now in use, and being used for the carrying on of said butcher business, said business and said fixtures, tools, racks and scales being located in the storeroom designated as No. 4865 Rainier Avenue, Seattle, Washington; said business is known as the Rainier Valley Meat Market; the said party of the first part agreeing to not enter into the butcher business within 12 blocks of said building for a period of two (2) years from this date. To have and to hold the same to the said party of the second part, his executors, administrators and assigns forever. And James Brassington does for his heirs, executors and administrators covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same. In witness whereof, I have hereunto set my hand and seal the 27th day of July in the year of our Lord one thousand, nine hundred and nine. James Brassington. [Seal.] Signed, sealed and delivered in the presence of Willard Burbank, J. A. Kelso."

In March, 1910, before the expiration of two years from the time of the execution of the bill of sale the respondent, with the co-operation of his brother-in-law, began preparations to open up a butcher shop within twelve blocks of the place of business described in the bill of sale. The brother-in-law took a lease in his own name of a building near the appellant's market for a term of years, and advanced the sum of $500 to be used in the prosecution of the enterprise. The work of fitting up the market was under the immediate supervision of the respondent. He purchased on his own credit the lumber necessary to fit up the interior of the building and the market fixtures necessary for use in the shop, and seems to have had complete charge of all the details. He caused a sign to be printed and stretched across the face of the building to the effect that the place would be opened up as a meat market on a certain day under the name of "Yakima Meat Market, James Brassington, Manager." He also requested the editor

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cf the local paper "to give him a boost," and from data furnished by him the following was produced and published:

"Returns to Columbia.

"James Brassington will Open Another Meat Market.

"James Brassington, the pioneer butcher of the Rainier Valley, who for many years conducted the Rainier Valley Market, opposite the Record office, has returned to Columbia, where he will again go into business.

"Several months ago Mr. Brassington sold his business in Columbia to Charles Nelson and went to North Yakima, where he became associated with the Yakima Meat Company. But the eastern part of the state did not apeal to him like the Rainier Valley, and he has returned. He has leased the room formerly occupied by Grayson's hardware store and is having it refitted for a market, which is to be supplied with all the latest and improved sanitary appliances.

"It will be a sanitary market in every sense of the term, Mr. Brassington declares, and will be known as the Yakima Cash Market. Most of the meat will be supplied direct from the abattoirs of the Yakima Meat Company, all being butchered under the closest inspection and sanitary arrangements. Mr. Brassington will also carry fish and game in season, thus affording reidents of the valley a home place to purchase everything in the meat and fish line. He expects to open for business about next Thursday, or Friday."

On these facts appearing the appellant conceived that the respondent was undertaking to engage in the butcher business in violation of the agreement contained in the bill of sale and brought the present action to restrain him from so doing. The appellant in his complaint set up the bill of sale and the agreement not to enter into business as therein contained, and alleged a violation thereof on the part of the respondent. The respondent defended on two grounds: First, that the agreement not to enter into business contained in the bill of sale was executed by him without consideration; and second, that the business in which he was about to engage was in fact the business of his brother-in-law, one Holly Cooper, and that his only interest therein was that of manager for a stated salary, he having no interest in the profits thereof. The trial court found with the contention of the respondent and entered a judgment dismissing the appellant's action. This appeal was thereupon taken.

The trial court found that the fair market value of the several articles of personal property sold by the respondent to the appellant approximated the sum paid as the consideration for the sale, and hence concluded that there was no consideration for the remaining part of the agreement not to enter into business within the prohibited territory. But this is not the correct test. Courts in transactions of this kind do not inquire into the adequacy of the consideration. This, in the absence of fraud or overreaching, is solely the business of the parties. The court inquires only into the legality of the consideration, not whether the party to be bound made an improvident bargain.

Here there was manifestly a legal consideration. By the bill of sale the respondent for a named sum of money sold to the appellant his business and agreed not to enter into a like business within a distance of twelve blocks of the place of business sold for a period of

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two years. The payment by the one party of the sum agreed upon furnished a legal consideration for all of the agreements of the other party — the agreement not to enter into business within the prescribed territory for the term of years prescribed, as well as the agreement to transfer the shop and fixtures. Indeed, the court could with the same legal propriety say that the money paid served as a consideration only for the agreement not to enter into a competing business as it can say that it served as a consideration alone for the shop and fixtures. The almost universal authority is to this effect. A case in point is Eisel v. Hayes, 141 Ind. 41, 40 N. E. 119, in which the court says: "The contract is as follows: "State of Indiana, Jackson County, Agreement between John Eisel and W. H. Hayes, witnesseth: 1st. Eisel sells and delivers to Hayes the following personal property, viz: 1 butcher's cooler, 1 meat rack (with hooks and pins), 2 meat saws, 2 butcher blocks and one counter, for which said Hayes pays cash in hand the sum of forty-five dollars ($45). And, it is further agreed as a part of this contract, that said Eisel is not to engage in the butcher business in Brownstown, nor nearer thereto than Seymour, Ind., nor sell any meat within that distance, during the time said Hayes carries on the butcher business in Brownstown, Indiana. Said sum of $45 is now paid by Hayes to Eisel. Witness our hands and seals this 20th day of March, 1893. John Eisel. [Seal.] W. H. Hayes. [Seal.]' Appellants contend that the contract does not show any consideration for their promise not to engage in the butcher business at the place and during the time named; that the $45 was given only for the implements purchased. We are of opinion that the whole contract must be taken together, and that the money paid by Hayes was for the transfer of not only the tools sold, but also the good will promised. The contract is a unit. Martin v. Murphy, 129 Ind. 464 [28 N. E. 1118]. Besides, 'the mere purchase of the stock in trade of a party is a sufficient consideration for that party's agreement to abstain from carrying on the particular trade in the place where the purchaser is to engage in it.' Beard v. Dennis, 6 Ind. 200 [63 Am. Dec. 380]. In the absence of fraud, the parties are presumed, as in case of any other contract, to have determined the question of consideration for themselves, and the court will not determine its adequacy. Duffy v. Shockey, 11 Ind. 70 [71 Am. Dec. 348]."

So in 24 Am. & Eng. Encyc. of Law, 852, it is said: "A contract in restraint of trade is amenable to the general rule that it must be supported by a consideration. There has, however, been considerable discussion in the cases upon the question of adequacy of consideration. The earlier cases held that there should be a consideration adequate to the restraint; as Lord Ellenborough said: 'The restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other.' In a leading case in the Exchequer Chamber, however, the doctrine of the older cases was overruled, and the principle established that the court could not inquire into the adequacy of the consideration, provided it was shown to possess some real legal value. In numerous cases it has been held that the sale of a business is sufficient consideration for the covenant restraining the vendor from the future exercise of his trade or profession, and that anything more than this is not necessary."

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See also Harris v. Theus, 149 Ala. 133, 43 South. 131, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17; McCurry v. Gibson, 108 Ala 451, 18 South. 806, 54 Am. St. Rep. 177; Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781; Up River Ice Co. v. Denier, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep 650

The trial court erred also we think in its conclusions as to the second question presented. Contracts of this character when limited as to the time they are to continue are not inimical to public policy. On the contrary, it is of public interest that every one may freely acquire and sell personal property and property rights. An established business in a desirable locality has value independent of the actual value of the stock and fixtures that may be on hand. It arises from the fact that the old customers will resort to the old place. This value may be further enhanced by the personnel of the owner or conductor of the business. It is of public interest that the owner and proprietor of such a business should be able to sell it at its full value, and that the purchaser thereof should receive what he desired to buy. Obviously the only way to obtain the personal element of such a business is to require the vendor to abstain from entering into business in competition with that which he has sold. And while the public interest may be that trade in general shall not be restrained, the law looks with favor upon a contract that enables a vendor to sell his property at its full value, and consequently recognizes and enforces such contracts as he must necessarily make in order to enable him to do so. It therefore looks with favor upon contracts of the nature of the one in suit, and gives it that construction which seems most in consonance with the intent of the parties. Turning to the agreement it is at once obvious that it was the purpose of both the vendor and purchaser to transfer to the purchaser as far as could be done the personal favor the vendor had with the community in which the market depended upon for patronage. This purpose was accomplished in the only way it could be accomplished, namely, by an agreement on the part of the vendor that he would not enter into a competing business. Now, it is likewise obvious that the purchaser will not have the benefit of this part of his bargain, if the vendor is permitted to go into a competing business within the prohibited time and prohibited area in any manner by which his personal consideration is thrown in favor of the competing business.

The facts in the record show that it is his purpose to do this. The business is advertised as his own. It is to be carried on under a descriptive name, followed by his own name over the title "Manager." No one else publicly appears as having an interest in the business, and naturally the public would think that in patronizing the new business they were benefiting the manager personally. In other words, he is now attempting to exert in favor of the new business that public favor with which he is regarded, and which he attempted to and did as far as lay in his power sell to the purchaser of the old business. In doing so he violated his contract and the trial court should have entered a judgment restraining him therefrom.

A parallel case is found in Jefferson v. Narkert & Company, 112 Ga. 498, 37 S. E. 758, wherein this language was used: "It is contended,

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however, by counsel for the plaintiff in error, that the judgment of the court was contrary to evidence, in that the testimony shows the defendant below was not the owner of this building, and had no financial interest in the same, and that, therefore, it did not show upon his part a violation of the contract; that he was merely engaged in the service of his wife, conducting the business as her employee. This gives rise, so far as we have been able to ascertain from investigation, to a new question before this court. After a careful reflection over this question, we are satisfied that the principle laid down in the first headnote is a correct statement of the law bearing on this case; and that a person entering into such a contract, not only stipulating for the sale of his good will to the vendee, but obligating himself not to engage in a business of selling, handling, or packing meats, in the city of Cordele, during a specified and reasonable time, could not, without violating that contract, carry on in that city, during the period covered by the agreement, a similar business for another, or in another name, of which he was the exclusive manager, and the success of which depended upon his skill, efficiency, influence, and popularity. What is a fair and proper construction of the contract into which he entered? There is no question, under the evidence, that the business in which he engaged was in direct competition with the business bought of him by the plaintiffs. One thing he sold to them was his good will; an obligation not to engage in a similar business in any of its various forms of selling and packing meats in Cordele. In the light of the testimony, there can be no question that he engaged in such business; and, instead of giving the parties with whom he contracted the advantages of his good will, he engaged in a service and occupation which directly had the effect of antagonizing and competing with their occupation, to their injury and damage, by the exercise of his skill and experience in the conduct of a similar business. The contract is not confined to preventing him from entering upon such business in his own name, as owner and proprietor thereof. It can be violated as much by an employee and agent, especially one who has the conduct and control of the business, as it could were he the proprietor of the business in which he engaged." See, further, Siegel v. Marcus, 18 N. D. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769; Meyer v. Labau, 51 La. Ann. 1726, 26 South. 463; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654; Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683; Emery v. Bradley, 88 Me. 357, 34 Atl. 167; Wilson v. Delaney, 137 Iowa 636, 113 N. W. 842; Geiger v. Cawley, 146 Mich. 550, 109 N. W. 1064.

The case of Haley Grocery Co. v. Haley, 8 Wash. 75, 35 Pac. 595, is not contrary to the position here taken. In that case the agreement between the parties was set forth with particularity, and, as we said in Canady v. Knox, 48 Wash. 685, 94 Pac. 652, "The only purpose was to prevent him [the party bound] from becoming personally interested in the profits of a rival business, either directly or indirectly." It is not so with the contract in the case at bar. The purpose of this agreement was to prevent the vendor exerting his influence and popularity in favor of a rival business, and this the facts clearly show he is proposing to do.

The judgment is reversed and the cause remanded, with instructions

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to enter a judgment enjoining the respondent from engaging in any manner in the butcher business within the area and period of time limited in the contract of sale set out in the complaint.

DUNBAR, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

Decision No. 1428.

In re JACKSON BRICK & TILE CO.

(District Court, Judicial D. Missouri, S. E. D. July 18, 1911.)

189 Fed. 636.

BANKRUPTCY — DEEDS — CORPORATIONS.

Where a trustee is in possession of real estate incumbered by a deed of trust, deposited as collateral scurity with a creditor of the bankrupt, and the creditor voluntarily appears before the referee and presents his claim for allowance as a secured claim by virtue of the deed of trust, the referee has jurisdiction to summarily determine the validity of the lien.

A corporation, by its president, executed a deed to another corporation of which the same person was president, and on the same date the grantee, by its president, executed a deed of trust to secure purchase money notes. Both corporations treated the deed as delivered, and the deed of trust and the purchase money notes were pledged as collateral for a loan made to the grantor by a third person. Held to show that the deed was delivered so that title passed thereunder prior to the execution of the deed of trust.

Where the incorporators took the formal steps required by statute to entitle the corporation to a certificate of incorporation, and the Secretary of State issued a certificate in due form, the corporation was a de facto corporation, though it had no stockholders, and though no part of its capital stock was paid in.

A transfer of property by or to a de facto corporation cannot be collaterally attacked, and is valid against all persons except the State.

Bankruptcy Act July 1, 1898, c. 541, § 60a, which provides that where the preference consists of a transfer, the period of four months shall not expire until four months after the record of the transfer, as required by law, extends the time within which a transfer may be attacked as a preference, and where a transfer is one which is required to be recorded, the four months' period does not begin to run until the conveyance is recorded, but where the transfer, when made, was based on a present consideration, delay in recording does not warrant the court in treating the conveyance as if made as security for an antecedent debt, and a transfer given as security for a present loan is not a voidable preference, though the transfer is not recorded until within four months of the adjudication in bankruptcy of the transferror.

Rev. St. Mo. 1899, § 925, provides that no instrument shall be valid except between the parties and such as have actual notice, until deposited for record. Bankruptcy Act July 1, 1898, c. 541, §§ 67a, 67e, 70e, confer on trustees the right to avoid transfers, voidable as fraudulent conveyances, or which may be avoided by creditors under the State law for want of record. A grantor, a corporation, conveyed its land to a grantee, a corporation, which on the same day executed a deed of trust to

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secure the purchase money notes. The grantor borrowed money from a bank and pledged as collateral the notes and deed of trust. Neither of the deeds were then recorded, but the bank later returned the deed of trust to the president of the grantor with instructions to record it, which was not done for nearly five years, and until within four months of the adjudication of the bankruptcy of the grantor. Before the record of the deed the grantor incurred debts to persons who relied on its ownership of the property. Held, that the deed of trust was constructively fraudulent as to creditors extending credit to the bankrupt, and the lien of the bank must be treated as invalid as against the trustee as a representative of the creditors.

In the matter of the bankruptcy proceedings against the Jackson Brick & Tile Company. Proceeding for review of an order of the referee in bankruptcy, allowing the claim of the Sturdivant Bank as an unsecured claim, and denying claimant's prayer for the allowance of its claim as a secured claim. Affirmed.

Oliver & Oliver, for Sturdivant Bank. Fordyce-Holliday & Ware, for Merchants-Laclede Nat. Bank. Moses Whybark and W. D. Hines, for trustee.

DYER, District Judge. This is a proceeding for review of an order of the referee in bankruptcy, allowing the claim of the Sturdivant Bank as an unsecured claim against the bankrupt estate and denying the prayer of the claimant that its claim be allowed as a secured claim. The Sturdivant Bank presented its claim against the bankrupt in the sum of $15,410, and set forth therein that it held as security for said indebtedness twenty-five promissory notes, each for $500, executed by the Jackson Chemical Manufacturing Company, a corporation, and that the last-mentioned notes were secured by a deed of trust upon 117 acres of land, and also upon two lots in Cape Girardeau county, Mo. The claimant prayed that its claim be allowed as a "preferred claim" against the bankrupt, and prayed that the land described in the deed of trust "be stricken from the schedule of assets belonging to the bankrupt estate and applied to the credit of the notes," referred to in the claim. The trustee of the bankrupt estate filed written objections to the allowance of the claim as a preferred one, alleging, in substaonce: (1) That the claimant obtained a preference in respect of its claim by means of a judgment rendered in its favor against the bankrupt; (2) that the transfer of the land mentioned in the deed of trust from the bankrupt company to the Jackson Chemical Manufacturing Company, and the deed of trust executed by the Jackson Chemical Manufacturing Company, constituted a voidable preference under the bankrupt law; (3) that the deed from the bankrupt to the Jackson Chemical Manufacturing Company, and the deed of trust of the latter company securing the notes held by the bank, were withheld from record by the bank for about four years, and that the withholding of said conveyances from record gave the bankrupt a fictitious credit and enabled it to procure material and labor and to borrow money on credit, and constituted a fraud in law against the creditors of the bankrupt; (4) that the "Jackson Chemical Manufacturing Company never had any legal existence, nor was a charter ever issued by the State of Missouri, or any other State, creating such corporation,

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and . . . if it did have such legal existence, it never had any assets or property of any kind, but was created solely for a fraudulent purpose, . . . and that said conveyance and the said incumbrance were executed with the intent to hinder, delay, and defraud the creditors of the bankrupt."

One Hugh R. Quinn, a creditor, by leave of the referee, also filed written objections to the allowance of the bank's claim, alleging, in substance: (1) That the real estate described in the deed of trust held by the bank is and always has been the property of the bankrupt company; (2) that the deed from the bankrupt company to the Jackson Chemical Manufacturing Company was never delivered and no title passed thereby; (3) that the said deed was not filed for record until within four months of the adjudication of bankruptcy; (4) that the Jackson Chemical Manufacturing Company, if incorporated in fact, had no authority under its charter to take and hold said real estate, and that the deed of trust made by the Jackson Chemical Manufacturing Company is null and void and of no effect; (5) that the deed of trust executed by the Jackson Chemical Manufacturing Company was never delivered, and no title passed thereunder; (6) that the deed of trust executed by the Jackson Chemical Manufacturing Company was not filed for record until within four months of the adjudication of bankruptcy herein and is null and void as a lien upon the estate of the bankrupt.

The referee afterwards heard the evidence submitted by the respective parties, and on March 23, 1908, made an order disallowing the claim "as a preferred or secured claim," and allowing it as a general claim in the sum of $16,275; and also made an order denying the application of the claimant to strike from the schedule of assets the land described in the deed of trust referred to in the claim. Thereafter, on April 2, 1908, the claimant, the Sturdivant Bank, filed with the referee a petition for review of the foregoing order and the referee has certified the matter to this court.

The material facts bearing upon this controversy, as they appear from the referee's summary of the evidence, are as follows:

The bankrupt company was incorporated in Missouri in April, 1897, under the name of the English Mining & Manufacturing Company, and in December, 1902, changed its name to the Jackson Brick & Tile Company. From the time of its original incorporation in 1897 until July, 1906, the bankrupt company was engaged in the business of manufacturing brick, fire brick and drain tile near Jackson, Mo., and had a manufacturing plant and certain lands in that locality. Henry R. English was the organizer and principal stockholder of the bankrupt company and throughout its career was its president and in complete control of its affairs. On September 12, 1902, Henry R. English caused a corporation to be organized under the statutes of Missouri under the name Jackson Chemical Manufacturing Company, said corporation purporting to have a full paid capital stock of $20,000, but the evidence tends to show that no part of this capital was ever paid in, and that Henry R. English caused the company to be incoroprated for the purpose of borrowing money for the bankrupt company, and that the company never transacted any business with the exception of the transaction to be hereafter mentioned. Immediately upon the incor-

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poration of the Jackson Chemical Manufacturing Company, the bankrupt company, then known as the English Mining & Manufacturing Company, executed a warranty deed, dated September 12, 1902, whereby it conveyed to the Jackson Chemical Manufacturing Company one hundred and seventeen acres of land and two lots in Cape Girardeau county, Mo., for an expressed consideration of $15,000. The deed just mentioned was acknowledged by English as president of the English Mining & Manufacturing Company, on September 18, 1902, and after being so acknowledged was left by English in the possession of one Limbaugh, the notary who took the acknowledgment, and remained in the possession of the notary for several months, and was then returned by the notary to English who placed it in his box in the vault of the Jackson Exchange Bank at Jackson, Mo., where it remained until July, 1906, when it was taken out and afterwards recorded under circumstances to be presently stated.

It further appears from the evidence that on September 12, 1902, the Jackson Chemical Manufacturing Company executed a deed of trust whereby it conveyed the 117 acres of land and the two lots here in question to one Henry L. Jones, as trustee, to secure the payment of twenty-five promissory notes for the sum of $500 each, executed by it and payable five years after date to the English Mining & Manufacturing Company. On December 4, 1902, the English Mining & Manufacturing Company borrowed $8,500 from the Sturdivant Bank, and pledged with the bank as collateral security for the loan the twenty-five notes of the Jackson Chemical Manufacturing Company above referred to. The evidence shows that in negotiating this loan the bankrupt company was represented by Henry R. English, who informed the bank that the notes were secured by a deed of trust upon certain lands formerly owned by the bankrupt company and that the bankrupt company had conveyed the lands to the Jackson Chemical Manufacturing Company by warranty deed, and that the notes were secured by a deed of trust upon the land executed by the Jackson Chemical Manufacturing Company.

It further appears from the evidence that at the time the loan was obtained from the Sturdivant Bank Henry R. English forwarded to the bank by mail the deed of trust executed by the Jackson Chemical Manufacturing Company to secure the collateral notes and requested the bank to return the deed of trust to him and that he would record it, and that the bank, on December 4, 1902, mailed the deed of trust to English and requested him to place it of record. The evidence further shows that the bankrupt company from time to time renewed the note evidencing the debt owing by it to the Sturdivant Bank and afterwards increased its debt to the bank by borrowing additional money so that in July, 1906, it was indebted to the bank in the sum of $15,000, for which the bank held as collateral security the twenty-five notes executed by the Jackson Chemical Manufacturing Company and secured by deed of trust before mentioned. The evidence shows that when the deed of trust executed by the Jackson Chemical Manufacturing Company was returned by the Sturdivant Bank to Henry R. English on December 4, 1902, that English did not file the deed for record, but placed it in his box in the vault of the Jackson Exchange Bank, and that it remained there until July, 1906, when it was

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taken out and afterwards placed of record under circumstances to be presently stated. Henry R. English testified that the reason he did not record the warranty deed from the bankrupt company to the Jackson Chemical Manufacturing Company and the deed of trust from the Chemical Company to Jones, trustee, was that he was advised by his attorney not to do so, and that he thought the recording of the instrument might affect the interests of the Jackson Exchange Bank of which he was president, and that he was at the time negotiating with parties in St. Louis to secure money and expected to take up the loan in a short time.

The evidence further showed that in September, 1902, the bankrupt company executed a deed of trust whereby it conveyed to Henry R. English lots 154, 155, 167, and 168 in the city of Jackson, and also certain lands in Cape Girardeau county, including the plant used by it for the purpose of making brick and tile, to secure twenty-five notes of $500 each executed by the English Mining & Manufacturing Company to the order of Henry R. English, that on September 12, 1902, English obtained a loan of $8,500 from the Merchants-Laclede National Bank of St. Louis, giving the bank a note for that sum executed by him, and deposited with the bank as security for the $8,500 and the twenty-five notes of the English Mining & Manufacturing Company referred to above. It further appeared that this deed of trust was not recorded, but remained in the possession of English until about July 19, 1906, when he delivered it to his attorney, one W. H. Miller, under circumstances to be stated hereafter. It further appeared that about July 6, 1906, the bankrupt executed and delivered to one Hugh R. Quinn a note for about $27,000 to cover an indebtedness due Quinn by the bankrupt company, and to secure this note the bankrupt executed and delivered to Quinn a mortgage covering the entire property and plant of the bankrupt company, and embracing substantially all the land described in the prior deeds of trust held by the Sturdivant Bank and the Merchants-Laclede National Bank.

The evidence further showed that in July, 1906, the bankrupt company had become heavily involved, was insolvent and unable to meet its obligations, and that English as president of the company placed the affairs of the company in the hands of his attorney, W. H. Miller, of Jackson, Mo., and turned over to Miller the deed from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, the deed of trust from the latter company to Jones, trustee, and also the deed of trust from the English Mining & Manufacturing Company to the trustee of Henry R. English, purporting to secure the notes held by the Merchants-Laclede National Bank. It further appeared that about July 19, 1906, W. H. Miller, as attorney for the bankrupt company, informed the Sturdivant Bank, the Merchants-Laclede National Bank and other creditors, that the company was in financial difficulties and unable to proceed with its business, that on or about that date Mr. Albert, president, and Mr. Oliver, attorney, of the Sturdivant Bank, Mr. Quinn, Mr. English, and Mr. Miller, had a conference in Jackson, Mo., in which the affairs of the bankrupt company were discussed. At this conference the president and attorney of the Sturdivant Bank learned that the deed from the English Mining & Manufacturing Company to the Jackson Chemical

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Manufacturing Company, and the deed of trust from the Jackson Chemical Manufacturing Company to Jones, trustee, had never been recorded, and also learned of the existence of the Quinn mortgage, and of the prior deed of trust purporting to secure the notes held by the Merchants-Laclede National Bank. The evidence tends to show that Mr. Quinn first learned at this conference of the existence of the deed of trust from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, of the deed of trust executed by the latter company purporting to secure the notes held by the Sturdivant Bank, and of the deed of trust executed by the English Mining & Manufacturing Company purporting to secure the notes held by the Merchants-Laclede National Bank. The evidence showed that the president of the Sturdivant Bank and all of the persons present at this conference were informed of the financial condition of the bankrupt company, and of the fact that the company owed about $69,000 and was insolvent. It further appears that after this meeting an endeavor was made to secure the consent of the creditors of the bankrupt to turn over its property to trustees with a view to carrying on the business for the benefit of the creditors, but that this arrangement was not perfected because of the objections of certain creditors. It further appears that on August 8, 1906, Hugh R. Quinn placed the mortgage given him by the bankrupt company of record, and that immediately thereafter and on the same day Mr. Miller, attorney for the bankrupt company, filed for record the deed from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, the deed of trust of the Jackson Chemical Manufacturing Company to Jones, trustee, and the deed of trust of the bankrupt company securing the notes held by the Merchants-Laclede National Bank. It further appears that on August 9, 1906, the Sturdivant Bank filed a suit against the bankrupt company upon the note of the company held by it, in the Cape Girardeau Court of Common Pleas, and caused a writ of attachment to be issued and levied upon the property of the bankrupt, and on September 27, 1906, secured judgment against the bankrupt by default in the sum of $15,410, and also a judgment sustaining the attachment; and that afterwards, on March 9, 1907, the court, upon the application of Joseph E. Schmuke, trustee of the bankrupt estate, made an order directing the sheriff to turn over to the trustee all of the property attached, together with the cash in his hands, and to return the execution previously issued in the cause unsatisfied and without prejudice to the plaintiff.

It further appeared from the evidence that a petition in involuntary bankruptcy was filed by creditors against the bankrupt on October 8, 1906, and resulted in an adjudication of bankruptcy on October 31, 1908. The evidence showed that in July, 1906, and thereafter, up to the time of its bankruptcy, the bankrupt company owed debts amounting to $69,959; that upwards of $25,000 of this indebtedness arose after the Sturdivant Bank had received the collateral notes delivered to it by the bankrupt in December, 1902; that between December 4, 1902, and July 19, 1906, the Bank of Whitewater had loaned the bankrupt about $2,600, and before making the loan had caused the title to bankrupt's real estate to be examined and had found no incumbrances thereon of record. It further appeared that in June, 1906, Hugh R.

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Quinn had made a loan to bankrupt company of about $27,000, and received from the bankrupt as security for the loan a deed of trust covering all the bankrupt's property including that embraced in the deed of trust to the claimant bank, and before loaning the money that Quinn had examined the records and found that no incumbrances were of record affecting the bankrupt's real estate. Quinn testified that at the time he received his mortgage he had no knowledge of the deed of trust given the claimant bank. The evidence makes it clear that Henry R. English, the president of the bankrupt company, withheld the various conveyances heretofore mentioned from record in order that the bankrupt might obtain credit upon its apparent ownership of the property described in such conveyances.

It is contended by the claimant bank that the referee has no jurisdiction to summarily determine the validity of its lien upon the land described in the deed of trust from the Jackson Chemical Manufacturing Company to Jones, trustee, and that the validity of such lien can only be adjudicated in a plenary suit. But the evidence shows that the land described in this deed of trust is in the possession of the trustee of the bankrupt estate, and it further appears that the claimant bank voluntarily appeared before the referee in bankruptcy and presented its claim for allowance as a secured claim, alleging that it had a lien upon the land by virtue of the deed of trust, and under these circumstances there can be no question that the referee had jurisdiction to determine the validity of the lien asserted, and to adjudge whether or not the claim should be allowed as a secured one. Chauncey v. Dyke Bros., 9 Am. Bankr. Rep. 444, 119 Fed. 1, 55 C. C. A. 579; In re Rochford, 10 Am. Bankr. Rep. 608, 124 Fed. 182, 59 C. C. A. 388; In re Granite City Bank, 14 Am. Bankr. Rep. 404, 137 Fed. 818, 70 C. C. A. 316; In re Schermerhorn, 16 Am. Bankr. Rep. 508, 145 Fed. 341, 76 C. C. A. 215; In re McMahon, 17 Am. Bankr. Rep. 531, 147 Fed. 684, 77 C. C. A. 668; In re Dana, 21 Am. Bankr. Rep. 683, 167 Fed. 529, 93 C. C. A. 238; Thomas v. Woods, 23 Am. Bankr. Rep. 132, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180; Mound Mines Company v. Hawthorn, 23 Am. Bankr. Rep. 242, 173 Fed. 882, 97 C. C. A. 394; Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. Under the facts disclosed in the evidence there can be no question that the debt due from the bankrupt to the claimant bank is a bona fide debt and that the bank gave a present consideration for the collateral notes secured by the deed of trust from the Jackson Chemical Manufacturing Company to Jones, trustee. The case, therefore, presents no question of positive fraud on the part of the bank, and if the bank's lien upon the property described in the deed of trust is to be held invalid as against the trustee in bankruptcy, it must because the deeds are to be treated as inoperative by reason of the delay in recording them, or for constructive fraud or for some other reason.

The referee in bankruptcy held that the deed from the bankrupt company to the Jackson Chemical Company was never delivered, and that, therefore, the title to the property here in question never passed from the former to the latter company. But in my opinion the evidence does not warrant this conclusion, and I feel constrained to find that there was sufficient delivery of the deed to pass the title from

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the grantor to the grantee company. The evidence shows that English was the president of both the English Mining & Manufacturing Company and the Jackson Chemical Manufacturing Company, and that he was in control of the affairs of both companies. It also appears that the deed from the English Mining & Manufacturing Company to the Jackson Chemical Company, and the deed of trust from the Jackson Chemical Company to Jones, trustee, were executed on behalf of the respective grantors by English as president, and that they were acknowledged on behalf of said grantors respectively by English as president on September 16, 1902, and that after being executed and acknowledged, both deeds were left for a time in the hands of the notary who took the acknowledgments, and were afterwards placed by English in his box at the Jackson Exchange Bank where he kept papers belonging to himself and his companies. It appears that later on, in December, 1902, when English negotiated the loan from the claimant bank, he forwarded the deed of trust by mail to the bank and suggested that the bank return the deed of trust to him to be recorded. The bank afterwards returned the deed of trust to English, requesting him to record it. It thus appears that English as president of English Mining & Manufacturing Company executed and acknowledged the deed whereby the company conveyed the land to the Jackson Chemical Company, and on the same day English, as president of the Jackson Chemical Company, executed and acknowledged a deed of trust whereby the latter company conveyed the property to a trustee, purporting to secure the purchase price and shortly thereafter English, as president of the English Mining & Manufacturing Company, pledged the notes secured by the deed of trust with the claimant bank to secure a present loan. Under the facts here disclosed, I am of opinion that the deed from the bankrupt company to the Jackson Chemical Manufactring Company must be regarded as having been delivered prior to the time the deed of trust was forwarded by English to the bank. What acts are sufficient to constitute delivery of a deed is largely a question of intention, and in the present case it appears that both the grantor and the grantee corporations treated the deed as duly delivered, and the grantee executed a deed of trust upon the property for the benefit of the grantor, and the grantor in turn pledged the notes secured by the deed of trust as collateral for a loan made by it by a third party, and under these circumstances the deed must be regarded as having been delivered so as to pass the title from the grantor to the grantee. Stevens v. Hatch, 6 Minn. 64 (Gil. 19); Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Farrar v. Bridges, 5 Humph. (Tenn.) 411, 42 Am. Dec. 439; Bunnell v. Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; Devlin on Deeds (2d Ed.), § 262.

In reaching the conclusion that the claimant bank did not acquire a valid lien under the deed of trust, the referee seems to have held that the Jackson Chemical Manufacturing Company was not legally incorporated, or that by reason of irregularities attending its incorporation, the company did not become a corporation de jure such as could acquire and convey title to the real estate here in question.

The evidence, however, shows that the incorporators of this company took all the formal steps required by the statute to entitle it to a certificate of incorporation, and that a certificate in due form was

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issued by the Secretary of State, and, although the evidence seems to show that the company had no bona fide stockholders, and that no part of its capital stock was ever paid in, it seems to admit of no doubt that the company was at least a de facto corporation, and it is well settled that the transfer of property by or to a de facto corporation cannot be collaterally attacked and will be held valid against all persons except the State. Finch v. Ullman, 105 Mo. 255, loc. cit. 263, 16 S. W. 863, 24 Am. St. Rep. 383.

In support of the order made by the referee it is further contended that the deed of trust is invalid because it constitutes a voidable preference under section 60, pars. "a" and "b" of the Bankrupt Act as amended. This contention is based primarily upon the amendment to section 60, paragraph "a," contained in the Act of February 5, 1903, which provides that:

"Where the preference consists of a transfer such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

It is to be noticed that the deed of trust here in question was executed in September, 1902, and that the notes secured thereby were delivered to the bank for a present loan on December 4, 1902; but that the deed was not recorded until August 8, 1896, within four months of the filing of the petition in bankruptcy. The transfer of title effected by the deed of trust was made prior to the enactment of the Amendatory Act of February 5, 1903, and it is open to doubt whether the amendment to section 60a contained in that act can be give retrospective effect so as to render it applicable to this transaction. But even if it is to be assumed that the amendment of 1903 is applicable to the transfer here in question, it still seems clear that the transaction cannot properly be treated as a voidable preference because the deed of trust was given to the bank as security for a present loan, and not for an antecedent indebtedness. In re Union Feather & Wool Mfg. Co., 7 Am. Bankr. Rep. 472, 112 Fed. 774, 50 C. C. A. 524; City Bank v. Bruce, 6 Am. Bankr. Rep. 311, 109 Fed. 69, 48 C. C. A. 236; Stedman v. Bank, 9 Am. Bankr. Rep. 4, 117 Fed. 237, 54 C. C. A. 269; Farmers' Bank v. Carr, 11 Am. Bankr. Rep. 733, 127 Fed. 690, 62 C. C. A. 446.

The provision of the statute that "where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if, by law, such recording or registering is required, was intended to postpone the time within which a transfer is open to attack as a preference until four months after the date of the recording of the transfer, where such recording is required by the local law; but while the statute postpones the time within which the transfer can be attacked the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four-month period during which it may be attacked does not begin to run until the conveyance is recorded, but if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant us in treating the conveyance as if it were made as security for an antecedent debt,

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because to do so would be to create by construction a transaction different from the actual one. It is true that in certain cases where the conveyance has no force and validity whatever as to creditors until recorded, the courts have held that the transfer may be regarded as first coming into existence when it is recorded (McElvain v. Hardesty, 22 Am. Bankr. Rep. 320, 169 Fed. 31; In re Newton, 18 Am. Bankr. Rep. 567, 153 Fed. 841, 83 C. C. A. 23; Bank v. Connett, 15 Am. Bankr. Rep. 662, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. [N. S.] 148); but in my opinion these cases are inapplicable to the facts here presented, and, as the transfer here in question was for a present consideration, it cannot properly be treated as a voidable preference.

The principal contention made on behalf of the trustee in bankruptcy is that the deed of trust must be held invalid against the trustee because they were withheld from record from September, 1902, to August 8, 1906, and during this period the bankrupt remained in possession of the property, continued to carry on its business, and obtained credit to the extent of more than $25,000 from various persons whose claims are now unpaid, and who, in extending credit, relied upon the bankrupt's apparent ownership of the property. In support of this contention the trustee relies upon the provisions of sections 67a, 67e, and 70e of the act. These sections of the statute confer upon trustees in bankruptcy the right to avoid transfers, incumbrances, or liens which are voidable as fraudulent conveyances, or which might be avoided by creditors under the State law for want of record, or other reasons. In respect of the present contention we are thus remitted to the State law and the validity of the deed of trust here in question is to be determined by reference to that law. Sction 925 of the Revised Statutes of Missouri 1899, referring to instruments conveying real estate, or whereby any real estate may be affected in law or in equity, provides that:

"No such instrument in writing shall be valid, except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

This statute, although broad and comprehensive in its terms, has been so construed as to have little effect, the general doctrine laid down in Missouri cases being that an unrecorded conveyance of real estate is good, except to bona fide purchasers or incumbrances for value and without notice. Cape Girardeau Road Co. v. Renfroe, 58 Mo. 265; Bank v. Rohrer, 138 Mo. 370, 39 S. W. 1047; Hord v. Harlin, 143 Mo. 469, 45 S. W. 274.

But it is well-established law in Missouri that a conveyance of real estate may, under certain circumstances, be held constructively fraudulent or inoperative as to creditors because of its being withheld from record. In Goldsby v. Johnson, 82 Mo. 602, loc. cit. 606, the Supreme Court, speaking through Judge Norton, said:

"It seems to be an established principle that a deed not at first fraudulent may become so by long being concealed, because by its concealment, persons may be induced to give credit to the grantor. In such cases the use that is made of it relates back and shows the intent with which it was made. The omission to place the deed on record or leaving it in the hands of the grantor, or placing it in the hands of a third person to be produced or suppressed as exigencies may demand, are instances of delay that are within the rule"

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In Central National Bank v. Doran, 109 Mo. 40, loc. cit. 49, 18 S. W. 838, it was held that where one indebted to a bank executed a deed of trust on his land with the understanding that it was to be withheld from record so as not to impair his credit, and another bank, relying upon the indicia of solvency thus created, extended credit to the debtor after execution of the deed of trust and before it was recorded, that the deed would be treated as constructively fraudulent as to the creditor so extending credit although there was no actual intent to defraud. In its opinion in this case the court said:

"The authorities cited by the plaintiff bank fully bear out the position that in circumstances similar to those related, a court of equity will postpone or set aside as fraudulent an instrument whose recording has been clandestinely delayed as aforesaid. And, apart from any agreement of the sort mentioned, some of the authorities hold that where a deed is concealed from the public, at least for a considerable length of time, while the record-owner remains in possession and is given a supposititious credit thereby, which results detrimentally to others who rely upon the outward indicia of solvency thus created, such deed will be declared constructively fraudulent, though no actual intent to defraud exists."

In Bank v. Buck, 123 Mo. 141, 27 S. W. 341, it appeared that a bank had taken two deeds from a customer as security for his indebtedness and withheld them from record for two and three years respectively, and did not place them of record until the day the grantor failed in business. While the deeds were so withheld from record, the grantor continued in business and incurred various debts. There was no agreement that the deeds should be withheld from record for any definite time, but the court concluded from the evidence that there was an understanding between the parties that the deeds should not be recorded until the bank regarded it as necessary for its protection to place them of record. The court in its opinion quotes with approval the language used in Hungerford v. Earle, 2 Vern. 261, that "a deed not at first fraudulent may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money;" and applying the principle that "every man is presumed to intend the necessary consequences of his act, and if an act necessarily delays, hinders, or defrauds creditors, then the law presumes it was done with a fraudulent intent," adjudged that the deeds were fraudulent and void as to the grantor's creditors. The same doctrine is laid down in case of Singer Manufacturing Co. v. Stephens, 169 Mo. 1, loc. cit. 10, 68 S. W. 903, 905, where the court said:

"The essential facts authorizing the decree entered herein by the trial court . . . are these: That although the appellant was found to have been the real owner of the land in controversy prior to the creation of the debt of plaintiff's assignor, and although she was found to have accepted the deed to the land at the time it was made in good faith and without the contemplation of a fraud upon the rights of any one, the court found that while she was the real owner of the land, she suffered the record title thereof to be and remain in her codefendant Charles Clifton, whereby he, on the strength of his apparent ownership of same induced the plaintiff's assignor to extend to him a credit which otherwise would have been denied. The mere

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recital by the court in its finding of facts 'that the conveyance of the land to the defendant Isabel Stephens was made and accepted by her in good faith and without fraud on her part' is no impeachment of the correctness or the validity of the decree subjecting appellant's land to the claim of a creditor of the apparent owner of the land, prior to the time appellant was invested with the legal title thereto in November, 1894. It was not necessary that the defendant Isabel Stephens should actually have known that her codefendant Clifton was obtaining credits from the plaintiff's assignor on the faith of his apparent ownership of the land in controversy which stood of record in his name, or that she did in fact know that credit had actually been extended to Clifton's creditor on the faith of his apparent ownership of the land, prior to the time the conveyance of the land was made to her. Actual knowledge of either of those conditions on part of appellant would have amounted to a positive fraud against plaintiff, and of this the court's finding of facts shows she was not guilty; but the decree entered was predicated upon the facts not that an intentional fraud was committed by appellant upon the plaintiff, but that a wrong had resulted to plaintiff by means of the conduct of appellant in so managing her property that plaintiff was induced to give to another on the strength of his apparent ownership of it a credit which otherwise would have been denied."

The facts in this case, in my opinion, bring it within the doctrine announced in the cases just referred to, and constrain me to treat the deed of trust as constructively fraudulent and unenforceable as against the trustee in bankruptcy. The evidence in this case shows that the claimant bank exercised little care or vigilance for its own protection, but relied implicitly on English. At the time the deed of trust was delivered to the bank in December, 1902, the record title to the property was in the bankrupt company and not in the Jackson Chemical Manufacturing Company, the grantor in the deed of trust. The bank made no investigation into the state of the record title, but simply accepted the statement of English that the Jackson Chemical Company had a warranty deed to the property and made no inquiry as to the whereabouts of the deed or whether or not it had been placed of record. The bank, after making the loan, returned the deed of trust to English on December 4, 1902, and English was permitted to remain in possession of both deeds for nearly four years without any inquiry upon the part of the bank as to the state of the title or as to the disposition made by him of the deeds. The evidence shows that the bank had knowledge of the fact that the bankrupt company was actively carrying on its business during this period, and as reasonable men they were bound to infer that the company was seeking and obtaining credit from at least some of those with whom it had business relations. The evidence makes it clear that English wilfully withheld both deeds from record for the purpose of securing for the bankrupt company such credit as would result from its apparent unincumbered ownership of the property, and the evidence also conclusively shows that the company availed itself of this fictitious credit, and after December, 1902, contracted debts amounting to upwards of $25,000, and that this indebtedness remains unpaid, and that the creditors extending the credit relied upon the company's ownership of this property, and

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indeed, that one creditor, Mr. Quinn, was subsequently given a mortgage by the bankrupt upon the same property embraced in the bank's deed of trust. The evidence constrains me to conclude that English, during this entire period, was pursuing a deliberate policy of raising money by mortgages upon the bankrupt's property and then retaining possession of the mortgages and suppressing them so that the company's credit might remain unimpaired. The evidence shows that English, by means of the execution and suppression of the various mortgages and deeds of trust, including the deeds here in question, has grossly imposed upon those who have dealt with the company and perpetrated a series of frauds upon the company's creditors, and it is apparent that English was enable to practice these frauds because of the blind confidence of the mortgage creditors, who, without taking any care to safeguard their own interests or to protect others, placed their mortgages in his custody and allowed them to remain in his possession for years without any inquiry as to the disposition of them by him until they learned of the bankrupt's failure in business. It is conceded that the bank made English its agent for the purpose of recording the deed of trust, but it is contended that the fraudulent purpose of English in failing to record the deed, cannot properly be imputed to the bank, because in suppressing the deed, English violated his instructions and was pursuing a course hostile to the bank and in the interest of the bankrupt company only. I think it is clear that the bank should not be charged with the positive fraud of English, but there can be little question that the failure of the bank's agent to record the deed must be given precisely the same legal effect and must entail the same legal consequences as if the bank itself had withheld the deed from record during the period it remained in the custody of English.

It is, however, contended on behalf of the bank that in Missouri a deed cannot in any case be treated as fraudulent or inoperative as to creditors because of failure to record it, unless it is withheld from record pursuant to an agreement between the parties. But a careful examination of the reported cases has led me to conclude that an agreement to withhold the deed from record is not, under all circumstances, necessary in order that the court may be justified in setting aside the deed as constructively fraudulent where the grantor has been permitted to continue in possession of the land, has to the knowledge of the grantee been carrying on his business, and has secured credit from persons who have dealt with him in reliance upon his apparent title. The real vice of withholding a deed from record results from the fact that knowledge of the conveyance is thereby withheld from the public, and persons are induced to give the grantor credit in reliance upon his ostensible ownership of the property; and the injury inflicted upon creditors is precisely the same whether the conveyance be withheld from record as the result of an agreement between the parties, or because of the grantee's negligent or wilful failure to record it, and the detrimental effect which will probably result can be as well foreseen by the grantee in one case as in the other. It is, of course, well settled in Missouri that the mere withholding of a deed from record, even if it be so withheld by agreement of the parties, will not render it voidable at the instance of creditors where

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the evidence does not affirmatively show that the complaining creditors were induced to give credit to the grantor in reliance upon his apparent ownership of the property. Bank v. Roher, 138 Mo. 369, 38 S. W. 1047; Bank v. Newkirk, 144 Mo. 472, 46 S. W. 606; Wall v. Beedy, 161 Mo. 625, 61 S. W. 864. The strongest case tending to support the validity of the bank's lien as here asserted is the case of Hord v. Harlan, 143 Mo. 469, 45 S. W. 274, where the absence of any agreement to withhold the deed from record is treated as a controlling circumstance, justifying the court in upholding the deed; but even in this case the court lays emphasis upon the fact that there were no circumstances in evidence tending to bring home to the grantee knowledge that the grantor was obtaining credit upon the faith of his apparent ownership of the land. In the still later case of Clark v. Lewis, 215 Mo. 173, loc. cit. 187, 114 S. W. 604, 608, the court discusses the effect of withholding a deed from record and says that, "The mere withholding a deed to, or mortagge upon, land from record will not, ipso facto, citiate the instrument. It is only when the withholding the instrument from record gives the grantor, upon the faith of the ownership by him of the property conveyed, a fictitious credit, and some one has thereby been misled to his injury, that such failure to record will be held to be fraudulent." Independently of the question of constructive fraud, I am of opinion that the lien of the bank should be treated as invalid as against the trustee as the representative of the bankrupt's creditors upon the equitable principle laid down in Singer Mfg. Co. v. Stephens, 169 Mo. 1, 68 S. W. 903. The bank must be charged by virtue of the recording laws, with knowledge of the fact that the title to the property in question stood from December 4, 1902, to August 8, 1906, in the bankrupt company, and in negligently permitting the title to stand in the bankrupt company during this period, a wrong has resulted to the creditors of bankrupt who have thereby been induced to give bankrupt a credit which would not otherwise have been bestowed.

Upon a careful consideration of the facts disclosed in the evidence and of the law applicable thereto as laid down in the Missouri cases, I have reached the conclusion that the deed of trust held by the bank should be treated as constructively fraudulent or inoperative as to those creditors who extended credit to the bankrupt subsequent to December, 1902, and as the amount of these debts considerably exceeds the value of the property embraced in the deed, the lien here asserted cannot be sustained. In my opinion the referee's order was justified by the evidence, and it will be affirmed.

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Decision No. 1429.

SHAWNEE FIRE INS. CO. v. COSGROVE et al.

(Supreme Court of Kansas. July, 1911.)

116 Pac. 819.

INSURANCE — SUBROGATION.

Where a loss by fire is occasioned to insured property by a wrongdoer and the loss exceeds the amount of insurance, the insured owner is the only proper party to recover damages from the wrongdoer.

In such case, if the insured brings an action for the recovery of the loss from the wrongdoer and the insurer is informed of the pendency of the action, that the insured does not wish to represent the interests of the insurer, and that there is talk of a settlement between the insured and the wrongdoer, it is the duty of the insurer to intervene in the action, and protect his own interests.

Where in such case the insured accepts, on settlement, damages from the wrongdoer which, added to the amount of the insurance, is less than the amount of his loss and expenses of litigation, the insurer, having made no effort to intervene and protect his own rights, can recover nothing from the insured.

(Syllabus by the Court.)

Appeal from District Court, Johnson County.

Action by the Shawnee Fire Insurance Company against James H. Cosgrove and Lyman E. Hancock. Judgment for defendants, and plaintiff appeals. Affirmed.

Mulvane & Gault and D. R. Hite, for appellant. C. L. Randall, for appellees.

SMITH, J. The appellant brought this action against the appellees to recover the sum of $500 which they had paid to the appellees on a policy of insurance, less its proportion of the expenses incurred by the appellees in the collection of their claim against the railroad company. The case was tried to the court without a jury, and at the conclusion of the evidence the court made findings of fact, in substance, as follows: That the appellees were the owners of a certain building and contents which were insured in the sum of $500 in the appellant's company, and $675 in other companies. The building was totally destroyed by fire. The value of the building was $2,100 and of the contents $1,400. On proof of loss the appellant paid the appellees the sum of $500, and the appellees also collected $675 other insurance. Thereafter the appellees brought suit against the St. Louis & San Francisco Railway Company to recover the loss occasioned by the fire, alleging that the fire had been set by the railroad company. In this suit they alleged the loss to be $3,500, but asked judgment for only $1,950 and attorney's fees. During the pendency of that action the suit was compromised without trial and dismissed by the appellees on payment by the railroad company of $1,500. The costs and attorney's fees paid by the appellees were between $425 and $440. The appellant had knowledge of the suit at the time it was pending, but took no part in the litigation, except the company advised with the attorneys

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for the appellees, which, however, was unknown to the appellees. The insurance company employed no attorney to represent them in the above litigation, nor offered to pay any of the costs or attorney's fees of the litigation. The actual loss by the fire was $3,500. As a conclusion of law the court found that the insurance company was not entitled to recover in this action, and rendered judgment against it for the costs. The insurance company filed a motion for a new trial, and on the hearing of this motion one of the attorneys for the insurance company testified that during the pendency of the action he discussed the case with the attorney for the appellees, and manifested a willingness to do anything in his power to assist in the prosecution of the case, but was informed by the appellees' attorney that he did not desire to represent the company, and that his clients did not want him so to do; that the witness inquired whether a compromise between the appellees and the railroad company was pending, and was informed that it had been talked about a little, whereupon the witness said, "I want to advise you now that if your client compromises this case, or you compromise it, or anything is done with reference to it by which your client recovers, the Shawnee Fire Insurance Company will claim such proportion of that recovery as we have paid out on this insurance policy." Individual members of the firm testified on this hearing that they knew nothing of any arrangement between their attorney and the attorneys for the appellant relative to the representation of the appellant in the litigation with the railroad company.

Practically the only question involved is whether the insurance company had any legal right to depend upon the appellees to defend their rights, or whether it was the duty of the insurance company to join hands with the appellees in the prosecution of the suit, or to intervene and set forth its rights. There is no question but that the insurance company could not have brought the action in its own name. The loss was greater than the amount of the insurance. That the suit against the railroad company for the loss was properly brought by the appellees, and not by the appellant, and that, as the loss was greater than the amount of the insurance, the appellant could not bring an independent action, is indicated by Railroad Co. v. Insurance Co., 59 Kan. 432, 53 Pac. 459, and Norwich Union Fire Ins. Co. v. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433. The reason for this is shown in the latter case by a quotation from an opinion by Judge Dillon in Ætna Insurance Co. v. Hannibal & St. Joseph R. R. Co., 3 Dill. 1, Fed. Cas. No. 96: "If one insurer may sue, then if there are a dozen, each may sue; and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since, both in Great Britain and in this country." It is also held in these cases that if the insured having been paid his loss, or a portion of it, by the insurer, recovers an amount from the wrongdoer in excess of the amount of the balance of his loss and expenses of suit, after deducting the amount paid him by the insurance company, he holds such balance in trust for the insurer; but it is not held in these cases that the insured is entitled to retain the entire amount of his loss and expenses of suit and also the amount paid by the insurance company, nor that the insurer is powerless to protect its interests in the action.

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While the insured is the only proper party to bring the suit against the wrongdoer, it does not follow that the insurer is powerless to protect his own interests, but for this purpose he may intervene, or, by consent of the insured, may join hands with him in the prosecution of the case. If, as in this case, the insurer is notified that the insured does not wish to solely represent the insurer, then it is the duty of the insurer to protect his own rights, especially when he had notice that a settlement was talked of. L. E. & W. R. R. Co. v. Falk & Phœnix Ins. Co., 62 Ohio St. 297, 56 N. E. 1020; T. & F. S. Ry. Co. v. Insurance Co., 17 Tex. Civ. App. 498, 44 S. W. 533.

After an insurer has intervened and shown he has a monetary interest in the result of the action, it is not to be presumed that any court would permit a settlement between the insured and the wrongdoer to the detriment of the insurer, but, on the contrary, that the rights of all parties would be protected.

Under the circumstances of this case, the appellant, having made no effort to intervene and look after its own interests, cannot hold the appellees responsible for settling the case as they thought best for their own interests.

The judgment is affirmed. All the justices concurring.

Decision No. 1430.

LEYDEN v. LAWRENCE et al.

(Court of Chancery of New Jersey. September 18, 1911.)

81 Atl. 121.

INSURANCE — SUBROGATION — MORTGAGES.

A mortgagee of real estate has an insurable interest therein, and when he insures the property at his own expense and solely for his own benefit, the insurer, if obliged to pay a loss occasioned by injury to the property, may be subrogated pro tanto to the rights of the mortgagee under the mortgage.

Where insurance has been taken by the mortgagee of real estate at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor in case of loss is entitled to have the avails of the policy applied for his benefit toward the discharge of the indebtedness.

Where an insurance clause in a mortgage gave the mortgagee the option to take out insurance at the expense of the mortgagor, but did not compel him to do so, the mortgagee was at liberty to insure at his own expense and solely for his own benefit; and, in the absence of proof that the insurance effected was for the joint benefit of the mortgagor and mortgagee, or at the mortgagor's expense, except the fact that the insurance, in amount, was in excess of the amount due on the mortgage, it could not be held that the mortgagor was entitled to have the amount of the loss credited on the mortgage; and hence the insurer, having paid such loss, was entitled to be subrogated to the rights of the mortgagee.

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Action by James J. Layden against Elijah W. Lawrence and others. Decree for complainant.

See, also, 79 Atl. 615.

French & Richards, for complainant. A. H. Swackhammer, for defendants.

LEAMING, V. C. At a former hearing touching the sufficiency of a plea which had been filed by complainant to the cross-bill of defendant, I held as follows: "It is settled in this State that a mortgagee of real estate has an insurable interest therein, and when such mortgagee, at his own expense and solely in his own behalf, procures insurance on the mortgaged property for the better security of his debt, the insurer, if obligated to pay a loss occasioned by injury to such property, may be subrogated pro tanto to the rights of the mortgagee under the mortgage. Sussex County Mutual Insurance Co. v. Woodruff, 26 N. J. Law 541; Nelson v. Bound Brook Insurance Co., 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308; Lawrence v. Union Insurance Co. (Sup.) 76 Atl. 1053. It may be said to be equally well settled that if the insurance has been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor will have the right, in case of a loss, to have the avails of the policy applied for his benefit toward the discharge of his indebtedness. Pearman v. Gould, 42 N. J. Eq. 4, 5 Atl. 811." I further held at that time that with the fact established by the mortgagor that the insurance in question had been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, pursuant to the clause in the mortgage which authorized the mortgagee so to do, the mortgagor would be entitled to have the avails of the policy applied for his benefit toward the discharge of his indebtedness. A further examination of the subject, at the conclusion of the final hearing on an answer filed to the cross-bill, assures me that the above statement of the law, as recognized in this State, is accurate.

At the final hearing, no evidence was introduced in behalf of cross-complainant, in support of the averment of the cross-bill to the effect that the insurance in question had been effected by the mortgagee in pursuance of the agreement contained in the mortgage, and no evidence was introduced in behalf of the defendants to the cross-bill upon that subject. There is therefore an entire absence of any evidence to establish the fact that the insurance was effected by the mortgagee for the joint benefit of himself and his mortgagor, or at the mortgagor's expense, except the fact that the insurance was, in amount, in excess of the amount due on the mortgage, and that the mortgage authorized the mortgagee to effect insurance at the expense of the mortgagor, in the event of the failure of the mortgagor to keep the premises insured. I am entirely satisfied, under this condition of the evidence, that the claim of cross-complainant that the insurance was effected pursuant to the clause in the mortgage cannot be sustained. The clause in the mortgage gave to the mortgagee the option to take out insurance at the expense of the mortgagor, but did not compel him to do so. The mortgagee was at liberty to insure for the joint benefit of himself and his mortgagor at the expense of the mort-

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gagor, or to insure at his own expense solely for his own benefit, and it is impossible to indulge the inference that the mortgagee did insure at the expense or for the benefit of the mortgagor, in view of the fact that the insurance effected by the mortgagee was, by its terms, solely for his "mortgagee interest."

It was urged in behalf of cross-complainant, however, that, as the clause in the mortgage authorized the mortgagee to insure at the expense of the mortgagor, the mortgagee was denied the privilege of insuring in any other manner, and a line of cases decided by the New York Court of Appeals was cited in support of that view; but I find nothing in the cases cited to support that proposition. On the contrary, in Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544, it is held that such a provision in a mortgage does not prohibit or prevent an insurance by the mortgagee on his interest as mortgagee, at his own expense and in his own behalf.

I entertain the view, therefore, that the failure on the part of the cross-complainant to establish as a fact that the insurance in question was placed by the mortgagee at the expense of the mortgagor, or for the benefit of the mortgagor, or in any manner, or for any purpose, other than that which appears upon the face of the insurance policies, is operative to defeat the relief sought by cross-complainant. It follows that the insurance companies, in whose behalf this suit for the foreclosure of the mortgage is brought, are entitled under the assignment of the mortgage from the mortgagee to enforce the mortgage lien. I reach this conclusion independently of the fact that the policies of insurance contained a clause providing for subrogation in behalf of the insurance companies in case of loss. It is therefore unnecessary to here determine whether these provisions for subrogations, which were annexed to the policies some days after the policies were issued, are effective.

I will advise a decree pursuant to the prayer of the bill.

GABBERT and HILL, JJ., concur.

Decision No. 1431.

CONNECTICUT FIRE INS. CO. v. COLORADO LEASING, MINING & MILLING CO.

(Supreme Court of Colorado. May 1, 1911. Rehearing Denied June 5, 1911.)

116 Pac. 154.

INSURANCE — VENDOR AND PURCHASER.

In an action on a fire policy, stipulating that it shall be void if insured conceals any material fact concerning the insurance or the subject-matter thereof, evidence held not to show any concealment in view of the fact that no inquiry was made by insurer about the matters alleged to have been concealed; "concealment" being an intentional withholding of any fact material to the risk, which the insured in good faith ought to communicate.

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A concealment within a fire policy stipulating that it shall be void if insured conceals any material fact concerning the insurance or the subject-matter thereof involves, not only the materiality of the fact withheld and which he ought to have communicated, but also the design of insured in withholding it; and the facts alleged to have been concealed must be material, and insured must have intentionally and fraudulently concealed them.

Where the materiality of facts withheld by insured in a fire insurance policy stipulating that it shall be void if insured conceals any material fact is not fixed by any writing, the materiality, together with the fraudulent intent of insured, must be determined by the jury from the circumstances.

Whether insured in a fire policy stipulating that it shall be void for fraud by insured touching any matter relating to the insurance or the subject thereof took out the insurance with a fraudulent purpose and speculative design of reaping pecuniary profit in the event of a loss held, under the evidence, for the jury.

An insurer in a fire policy stipulating that it shall be void if interest of insured be other than unconditional and sole ownership, seeking to defeat the policy for defects in title of insured, must allege and prove the same, and where insurer proved that a tax certificate was transferred to insured subsequent to the issuance of the policy, but failed to prove that insured was not the holder of the certificate when the policy was issued, it failed to prove that the tax certificate was outstanding against insured at the time the insurance was effected.

A purchaser in possession under a contract of purchase is the unconditional and sole owner within a fire policy though the purchase money has not been paid in full; the purchaser not being in default.

A fire policy stipulating that it shall be void if the interest of insured be other than unconditional and sole ownership is not rendered void merely because of the issuance of a tax certificate creating, at most, a lien for taxes in existence in substance before the tax sale.

The title of the purchaser in a contract for the sale of real estate is equitable, embracing full ownership in fee, and the vendor holds the legal title in trust for the purchaser; and, where the purchaser is in possession, the vendor may not convey the legal title to another free from the trust.

A stipulation in a fire policy that it shall be void if the interest of insured be other than unconditional and sole ownership does not distinguish between a legal and an equitable estate in fee, but the latter is sufficient.

In an action on a fire policy issued and taking effect without any application therefor, an application for insurance made by insured to another insurer several days after the issuance of the policy sued on is inadmissible.

In case of doubtful meaning, a policy must be construed in favor of insured.

Forfeitures of policies are not favored, and a court will not declare a forfeiture by implication.

A fire policy stipulating that insured shall within sixty days after fire render a statement, and that no action shall be brought on the policy until compliance with its requirements, and providing in separate clauses for forfeitures in enumerated instances, is not invalidated by insured's failure to make the statement within sixty days after a loss, but his failure merely postpones the time of payment, and does not defeat a recovery in an action commenced after sixty days after the statement was furnished, and within twelve months after the loss.

Appeal from District Court, Fremont County; Morton S. Bailey, Judge.

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Action by the Colorado Leasing, Mining & Milling Company against the Connecticut Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 27th day of May, 1904, the appellee Milling Company, hereinafter called the plaintiff, insured its reduction mill at Florence against loss by fire for a sum not exceeding $60,000, represented by policies in several different companies. Sixteen thousand dollars of this was on the mill building, $31,000 on the machinery, tools, and appliances of the mill, $8,000 on ore and mineral in the mill, $2,000 on supplies of every kind, $2,000 on the office and laboratory building, and $1,000 on the furniture of its office and assay department. The policy upon which this action was brought was issued by the local agent of the defendant insurance company at Florence, and insured one twenty-fourth of the property in an amount not exceeding $2,500. On the 4th day of March, 1905, the property insured was totally destroyed by fire. Upon a refusal of the defendant to pay its proportion of the insurance this action was commenced, and a trial by a jury resulted in a verdict and judgment against the defendant in the sum of $1,837.28, from which judgment the defendant appealed.

Owing to the character and number of questions raised by the defendant, it is necessary to state the facts with some detail. The mill was built in the fall of 1897 or spring of 1898. Before its acquisition by the plaintiff, it had been idle, except for about forty days. The defendant claims that the enterprise failed. This is no doubt true, but apparently from the evidence the failure was due, not to the fact that the mill would not pay, if properly managed and operated, but to the fact that the owner did not have the money to pay for the mill or other expenses of its business. Actions for money judgments were brought against the owner, in aid of which attachments were levied on the mill, and finally sheriff's deeds were issued to one Tuthill, based upon judgments obtained in those actions. Afterwards Tuthill died, leaving a widow, who, so far as the record shows, was his sole heir. She lived in Boston, and was desirous of selling the mill. At that time the plaintiff had a lease upon the Dexter mine in the Cripple Creek district, and also owned or leased the El Paso dump, and was desirous of obtaining the mill for use in the reduction of its ores.

On April 2, 1904, one Andrews, a real estate and insurance agent at Florence, at the request and on behalf of the plaintiff, obtained from Mrs. Tuthill, through her agent in Denver, a contract, whereby she sold the mill and ground upon which it stood to Andrews for $10,000, and agreed to convey it in fifteen days, free and clear of all liens and incumbrances, and Andrews agreed that within thirty days after the deed was presented and tendered he would pay the purchase price of $10,000 less $500 which he paid at the time he received the contract, and the contract recited that Andrews was to have possession of the mill. On April 4th, two days therefater, Andrews assigned this contract to the pliantiff, and received the $500 which he had paid on the purchase price, and the plaintiff agreed to pay the balance to Mrs. Tuthill. The plaintiff took possession of the mill, put it into condition for operation, started running it on the 29th or 30th of May, and continued to operate it until the time of the fire in the following

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March. In August or the early fall of 1904 the plaintiff lost its lease upon the Dexter mine, and thereafter continued operating with the ore from the El Paso dump. The plaintiff expended about $7,000 in improving the mill besides the necessary labor, and about half of this was done before the issuance of the policy in suit. On the 27th day of May, the date of the issuance of the policy, $5,000 had been paid on the purchase price of the mill. The final payment of the purchase price was made on July 6th. A deed from Mrs. Tuthill, running to Andrews, was then delivered, and on the same day Andrews delivered a deed of the premises to the plaintiff.

Some time after the contract of purchase was obtained the matter of insuring the mill was talked over, an amount of $60,000 was agreed upon and the matter was turned over to Andrews. He wrote a policy for $15,000 of insurance in a company that he represented and gave the balance over to Mr. McCandless, another real estate and insurance agent at Florence, who represented several companies, among whom was the defendant. There was no written application for the insurance and no inquiries or representations were made about the value of the mill or plaintiff's title to it. The purchase price of the mill was not disclosed. Mr. McCandless knew the mill from the time it was erected, but said he did not know anything about its value. He took it for granted that it was worth the amount of the insurance. Later he inspected the mill in company with another agent for another company. He examined the mill thoroughly for fire protection, and was satisfied to continue the risk. Two or three days after the policies were issued and delivered a blank application for one of the companies, other than the defendant, was handed to the plaintiff, filled out, and signed by it, and returned to Mr. McCandless. In this application the answers, among other things, indicated that the property was not mortgaged or incumbered; that there never had been any legal or other difficulty about it; that it was a paying investment to the owners; that the prospects for future profitable use of the property were first class, and that it would sell for $63,000. The policies provided that the amount of loss, in case of fire, should be determined by the insured and insurer, and, if they could not agree, then by appraisers. On April 6, 1905, after entering into a nonwaiver agreement, the plaintiff and insurance companies compromised and adjusted the total loss at $38,809.15.

The plaintiff was an Arizona corporation, with a capital stock of $75,000 divided into 750,000 shares of the par value of ten cents each, and was engaged in leasing and operating mining property. At the time it purchased the mill its indebtedness was about $30,000. It had about 180,000 of its shares of stock for sale. This stock was disposed of at its par value. On June 20th Andrews was given 10,000 shares for his services in purchasing the property. This is all he ever owned and he afterward became the manager under salary. At the time of the fire the indebtedness of the company amounted to about $19,000, and there was in the mill about $2,100 worth of ore. The stock of the company was distributed among about 285 holders. The mill had paid a small profit. Such remaining facts as are necessary will appear in the opinion.

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Sylvester G. Williams and Clyde C. Dawson, for appellant. James T. Locke, for appellee.

MUSSER, J. (after stating the facts as above). The defendant set up eleven separate defenses, each of which related to an alleged breach of some condition of the policy, which it is argued was sufficient to defeat the action. Numerous errors are assigned, most of which centre about and are related to the first. The first assignment of error is that the court erred in refusing defendant's request to instruct the jury to return a verdict in its favor. The policy provided that it should be void if the insured had concealed any material fact or circumstance concerning the insurance or the subject thereof, or in case of any fraud by the insured touching any matter relating to the insurance or subject thereof, whether before or after a loss. Aside from an alleged fraudulent intent which the defendant says was concealed from it, and which will be noticed later, it is the contention of the defendant that the plaintiff concealed from it the fact that the plaintiff had purchased the property for $10,000, and had not paid the entire purchase price, and that the property had for many years been the subject of continuous litigation and controversy, and had been idle and thereby impaired in value, and that the title had become involved in great uncertainty and dispute. It is well to say here that there is no evidence that the title to the property had ever been involved in any litigation or uncertainty. It is true that attachment issued in aid of actions for money demands, and that executions issued upon money judgments obtained against the owner were levied upon the property, and that it had been sold under these executions, and that sheriff's deeds had issued thereon; but this litigation did not relate to the title to the property. It was not litigation between rival claimants to the property, nor was the title uncertain. The attachments and executions were levied by creditors of the owner, and the sheriff's deeds merely transferred the undisputed and certain title of the owner to another, who obtained a title undisputed and involved in no uncertainty. It is true that the property had been idle and may have been impaired in value thereby to some extent, but that fact was as well known to the agent of the defendant as it was to the plaintiff, for that agent lived in Florence, was engaged in a business that was bound to call his attention to the activity of the various industrial enterprises of the town, and he was acquainted with the mill from the time that it was built.

The defendant claims that inasmuch as these matters, which it says were concealed, were material, the court should have instructed for it. The defendant loses sight of a very important fact in this case, and that is that no inquiry was made of the plaintiff about the matters alleged to have been concealed, and that no written application was made for this insurance. "Concealment is the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate." Clark v. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721.

So that a concealment involves, not only the materiality of the fact withheld and which ought to have been communicated, but also the design and intention of the insured in withholding it, and, of course,

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the condition in the policy must be construed in the light of this definition of a concealment with which it is concerned. If an inquiry is made about a material fact and that fact is not disclosed upon such inquiry, it is very likely that the person questioned intended to withhold it; but, if no inquiry is made, the intention to withhold the fact is not so plain. Hence the authorities make a distinction between cases where inquiry is made and cases in which no inquiry is made. The rule is stated in Wood on Insurance 388: "When no inquiries are made, the intention of the assured becomes material, and, to avoid the policy they must find, not only that the matter was material, but also that it was intentionally fraudulently concealed." To the same effect are Alkan v. N. H. Ins. Co., 53 Wis. 136, 10 N. W. 91; Van Kirk v. Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798; Johnson v. Scott, Union and Natl. Ins. Co., 93 Wis. 223, 67 N. W. 416; Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609; Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. 434, 19 Ky. Law Rep. 204; Arthur v. Palatine Ins. Co., 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; 2 Clement on Ins. 3, 4.

It is thus seen that in the circumstances of this case it is not alone the materiality of the facts which were withheld that was to be found, but also whether or not the plaintiff intentionally and fraudulently withheld them. The materiality of these facts was not fixed by any writing, as is often the case in insurance, but it must be drawn from circumstances. So also must the fraudulent intent of the assured be drawn. It is said in 1 May on Insurance, § 195, that where the materiality is to be inferred from circumstances and not upon the construction of some writing, it is a question for the jury. How much more would the fraudulent intent of the insured in withholding these facts be for the jury? It was not for the court to say as a matter of law that the facts alleged to have been concealed were material, and that the insured had intentionally and fraudulently withheld them, and hence no error was committed in refusing to instruct the jury to return a verdict for the defendant so far as such concealments were concerned. The defendant itself saw the propriety of such a ruling when it asked the court in a number of instructions to submit to the jury the question of the materiality of the facts alleged to have been concealed, and that, if they found them material, to return a verdict for defendant. The defendant is not now consistent in urging this court to say that the lower court ought as a matter of law to have said that material facts were concealed, and at the same time urge this court to say that the lower court erred in refusing to give instructions submitting the question to the jury. The mistake which the defendant made in its request for such instructions was in asking the court to tell the jury that if the facts alleged to be concealed were material they should find for the defendant, omitting in each of the requested instructions the necessary element under the facts in the case, the jury must also find that the facts were intentionally and fraudulently concealed before they could find for the defendant. This answers a number of the assignments of error in this case relative to the refusal to give requested instructions. The jury was not wrongly instructed in this matter. If there was any failure to instruct thereon, though we do not say that there was, it was only nondirection.

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Another ground upon which the defendant claims that a verdict should have been directed is that the insurance was taken out with a fraudulent purpose and speculative design, and not for the purpose of indemnity; that it was sought in an amount greatly in excess of the purchase price and value of the property, with the design of reaping great pecuniary profit, in event of loss, and to give a fictitious value to the property and stock of the company to aid it in the sale of its stock, and that thus a situation was fraudulently created by the plaintiff, whereby it would be more profitable to the plaintiff to obtain the insurance than to preserve the property, thereby greatly increasing the moral hazard of the risk without the knowledge of the defendant. This whole matter was submitted to the jury in a clear, full, and complete instruction. The defendant admits that the instruction was a correct statement of the law, but insists that under the evidence it appeared so clearly that the insurance was taken out in bad faith by the plaintiff for the purposes of speculation, and not for indemnity with a fraudulent intent of reaping great profit in case of loss and of aiding it in the sale of its stock, that as a matter of law the court ought to have so declared and instructed the jury to return a verdict for defendant. The most liberal statement that can be drawn from the authorities to aid the defendant in this contention would be to say that it is only where the facts are such that all reasonable men must draw the same conclusion from them that the drawing of the conclusion is ever considered as one of law for the court; and, when a given state of facts is such that reasonable men may fairly differ in the conclusion to be drawn therefrom, the determination of the matter is for the jury, and even such a statement is qualified by some courts. Sullivan v. Phenix Ins. Co., 34 Kan. 177, 8 Pac. 112. Be that as it may, the conclusion which the defendant asks the court to draw as a matter of law in this case is to be drawn from a great number of circumstances appearing or claimed to appear from the evidence. If the evidence is rightly analyzed, some of these circumstances alleged to exist are but conclusions themselves. No authority has been cited, and it can be said with reasonable certainty that none can be found where, in such a case as is now before this court with all its facts and circumstances, it is said that the conclusion follows as a matter of law that the insurance at its inception was fraudulent on the part of the insured. The question whether the loss was brought about by the acts or procurement of the plaintiff — in other words, whether or not the plaintiff deliberately caused the fire — was submitted to the jury in another instruction, and the jury found against the defendant on that. The main argument of the defendant for its contention seems to be the fact that the plaintiff purchased the mill for $10,000 and then sought and obtained insurance in a sum not exceeding $60,000. That fact was before the jury, together with all the other facts and circumstances of the case. At least $10,000, and probably $11,000, of the insurance was on personal property that was not purchased with the mill; that is, ores and supplies, and possibly the furniture and appliances in the general office and assay office. Here was a completed mill, tested and found to be equal for the work required. After the purchase and before the insurance was taken out, about half of $7,000, besides the necessary labor, was put into it by way of improvements, and before

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the fire the whole of that sum was so expended. There is no testimony that the erection of the mill did not originally cost $60,000 or more. The plaintiff was engaged in mining, and needed this mill for the reduction of its ores. It had ore to be reduced, and had reasonable expectations that it would continue to have ore. It was its business to mine ore. As a matter of fact, it did continue to obtain ore and run the mill to the time of the fire. There is no reasonable doubt that to the widow in Boston, not engaged in mining or milling, and to persons similarly situated, $10,000 was worth as much as the mill. Can it be said from this fact that the mill, in the hands of an owner engaged in mining, who expected to be so engaged and who needed the mill in his business, was not worth the sum of $60,000 or more, especially when it is not made to appear that the construction of such a mill would not cost $60,000 or more? In a prospectus of the plaintiff, introduced by the defendant itself, for the purpose of showing that the plaintiff wanted the insurance for speculation and to aid it in a stock-jobbing scheme, it was represented that the mill consisted of a main building 70 by 162 feet, an engine house 28 by 74 feet, and an assay office and refining department 36 by 36 feet, and a scalehouse; that it was equipped with all the necessary machinery for crushing and reducing 150 tons of oxidized ore daily; that it was built of the best material, complete in every detail for the handling of such ore as the company had, and that it was built at a cost of $62,000. Not a word was said about the insurance. There is no evidence to show that these representations were not true in any particular. Must a court find as a matter of law that these representations were untrue merely because they were made? Nay, rather until the contrary is made to appear, the presumption is that they were true. In addition to all this, there was before the jury the circumstance that the policy itself was an open one; that is, it provided that the insured could only recover the actual cash value of the property at the time of its destruction by fire. The amount that the defendant would have to pay was not determined by the amount for which the policy was written. The defendant itself did not appear to attach much materiality to the value of the property, for it made no inquiry about it. No representations were made to it relative to the value at or before the issuance of the policy. Can it be said as a matter of law, in such a case that the insured obtained insurance not exceeding $60,000 on $10,000 worth of property with the intent of making great pecuniary gains therefrom, when all that could be recovered, in any event, was the actual cash value of the property not exceeding the limit fixed, whether the value was $10,000 or $60,000?

Enough has been said to clearly show that a different conclusion can be reasonably drawn from the circumstances of this case than the one drawn by defendant, and to demonstrate that, if the court below would have directed a verdict on the grounds urged by the defendant, that court would have committed error against the plaintiff, and it is equally clear that the lower court committed no error against the defendant when it submitted the question to the jury, under an instruction which was a correct statement of the law. There was a condition of the policy that, unless otherwise provided by agreement indorsed thereon or added thereto, the policy should be void, if the in-

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terest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple. The defendant says that a verdict should have been directed in its favor, for the reason that no agreement was indorsed on or added to the policy, and the undisputed evidence is that the interest of the plaintiff in the premises insured was that of a vendee under a contract of purchase and hence not a fee simple, and that there was a lien for the purchase price and an outstanding tax sale certificate against the property, which rendered plaintiff's ownership other than unconditional and sole. If this contract of purchase is examined, it is found that the vendor sold the land and mill thereon to the vendee, and that she agreed to convey it to the vendee, free and clear from all liens and incumbrances within fifteen days, or sooner if practicable. The vendee agreed that within thirty days after the presentation or tender of the deed to him he would pay the balance of the purchase price. No reservation of any lien for the purchase money was made, nor was the conveyance dependent on the payment of the balance. The vendor had at most fifteen days from the date of the contract within which to convey the property to the vendee, clear and free from all liens and incumbrances, and the vendee had at least thirty days from that date to pay the balance. It is difficult to conceive how the vendor had a lien under such a contract. The facts with reference to the tax certificate were that it had issued, but it was transferred to the plaintiff. When the certificate was transferred to the plaintiff, it was no longer outstanding against the plaintiff. The defendant proved that the certificate was transferred to the plaintiff at or before the delivery of the deed on July 6th. Under this proof, the plaintiff may have been the holder of the certificate on May 27th, when the policy was issued.

The defendant, after proving that the plaintiff may have been the holder, failed to prove that the plaintiff was not the holder when the policy was issued, and thus failed to prove that this tax certificate was outstanding against the plaintiff at the time the insurance was effected. It therefore failed to prove facts sufficient to maintain its position with reference to this matter. It would have to and did allege facts in defense that would present the issue. Loyal Mut. Co. v. Brown Co., 47 Colo. 467, 475, 107 Pac. 1098. It is elementary that whatever must be pleaded must also be proven. For the purposes of this case, however, it may be assumed, as contended by the defendant, that the vendor had a lien upon the land for the balance of the purchase money merely because the balance was unpaid, and it may be assumed that the tax certificate was outstanding in the hands of another party at the time of the issuance of the policy.

This contract of sale and purchase was at once assigned to the plaintiff by Andrews, and the plaintiff succeeded to all rights and liabilities thereunder. The relation of a vendor with a lien for the purchase money to the vendee in possession is the same as that of a mortgagee to a mortgagor in possession. Loventhal v. Home Ins. Co., 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17. That case holds that a mortgage upon the land is not violative of such a condition in a policy, and refers to many cases supporting the position, quoting from Dolliver v. St. Jos. Ins. Co., 128 Mass. 315, 35 Am. Rep.

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378, as furnishing a key to the rulings in all the cases referred to. Besides, as will be seen hereafter, there are many cases holding that a vendee in possession under such a contract of purchase is the unconditional and sole owner, notwithstanding that the purchase money has not been paid in full. The tax sale had not changed the interest of the owner. The certificate was, at most, a lien. The tax was a lien before the sale and before it became delinquent. The sale merely changed the form of the lien and transferred it from the State, county, and municipality, or whoever held the lien, to the holder of the certificate. It might as well be said that if an owner takes out a policy with such a condition before he pays his taxes, whether delinquent or not, it will be void upon loss, because the property was incumbered with the lien of the taxes at the time the insurance was effected.

At the time the policy was issued the plaintiff was the holder of the contract of purchase, in possession, using and improving the property and exercising all acts of full ownership. It had paid one-half, or $5,000, of the purchase price. It was absolutely bound to pay the balance when due, though the mill burned down before that time. It was not in default. True, it did not have the legal title.

Its title was an equitable one, but it was an equitable title that contemplated and embraced full ownership. The estate owned may be in fee simple, though the title by which it is held be an equitable one. The plaintiff was the owner in fee simple by an equitable title. The vendor held the legal title in trust for the plaintiff. The plaintiff being in possession, the vendor could not convey this legal title to another, free from the trust impressed upon it.

The condition in the policy does not distinguish between a legal and equitable estate in fee. The latter responds to the condition. The plaintiff was the unconditional and sole owner in fee simple within the meaning of the policy. These views are fully sustained by the following authorities, in many of which the purchase price had not been paid in full: Loventhal v. Home Ins. Co., 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; Pa. F. Ins. Co. v. Hughes, 108 Fed. 497, 47 C. C. A. 459; Imp. F. Ins. Co. v. Dunham, 117 Pa. 469, 12 Atl. 668, 2 Am. St. Rep. 686; Elliott v. Ashland Mut. F. Ins. Co., 117 Pa. 548, 12 Atl. 676, 2 Am. St. Rep. 703; Lewis v. New England F. Ins. Co., (C. C.) 29 Fed. 496; Dupreau v. Hib. Ins. Co., 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; Queen Ins. Co. v. May, (Tex. Civ. App.) 35 S. W. 829. The reasoning in Baker v. State Ins. Co., 31 Ore. 41, 48 Pac. 699, 65 Am. St. Rep. 807, is to the same effect, as is also that in Pelton v. Westchester F. Ins. Co., 77 N. Y. 605. The following authorities hold that such a vendee is the unconditional and sole owner of the property purchased within the meaning of a clause in an insurance policy requiring such ownership, and in some, if not in the most of these, the purchase price was not paid in full: Milwaukee Mechanics' Ins. Co. v. Rhea & Son, 123 Fed. 9, 60 C. C. A. 103; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Knop v. Ins. Co., 101 Mich. 359, 59 N. W. 653; Chandler v. Com. F. Ins. Co., 88 Pa. 223; Martin v. State Ins. Co., 44 N. J. Law 485, 43 Am. Rep. 397; Davis v. Pioneer Fur. Co., 102 Wis. 394, 78 N. W. 596; Matthews v. Cap. Ins. Co., 115 Wis. 272, 91 N. W. 675. In the case last cited the court, with reference to a vendee under a land contract,

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being the unconditional and sole owner, said: "It does not seem that we are called upon to reconsider or discuss a matter so well settled as the law on the subject in question." And in 123 Fed., 60 C. C. A., supra, a case where a part of the purchase money remained unpaid, Judge Lurton said: "That a vendee in possession under a written agreement for the sale and purchase of the property is the equitable owner thereof, and authorized to represent himself as the owner, or the 'sole and unconditional' owner, within the meaning of that term in fire policies, is hardly the subject of debate." The nearest expression there is on the subject in this State is in Wich v. Eq. F. & M. Ins. Co., 2 Colo. App. 484, 31 Pac. 389. In effect, that case decides that such a vendee is the equitable owner invested with the entire, unconditional, and sole ownership.

The defendant says the court erred in refusing to admit in evidence an application for insurance made by the plaintiff to a company other than the defendant, and delivered to McCandless several days after the policy in this case was issued. That the application was inadmissible, even if made to the defendant, when it does not appear that the making of the application was a condition precedent to the policy taking effect, or that it was made under an agreement on the part of plaintiff to make one after the issuance of the policy, is settled by this court in Loyal Mutual Co. v. Brown Co., 47 Colo. 467, 107 Pac. 1098, and when made to an entirely different company than the defendant there is much more reason for not admitting it. The defendant at no time before or after the issuance of the policy asked for any representations from the plaintiff. The policy contained the following provisions: "If fire occur the insured . . . within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating . . . No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." It also provided that the loss should not become payable until sixty days after notice, ascertainment, estimate, and satisfactory proofs of loss required had been received by the company, and that suit upon the policy must be commenced within twelve months after the fire. As a matter of fact, the required statement was sent after the expiration of the sixty days, and was ever after retained by the defendant without objection thereto, on any ground, until it filed its answer in this case. The question of waiver, however, will not be considered. It is not provided that there shall be a forfeiture, or that the company will not be liable in case the statement is not rendered within sixty days after the fire. There are a number of clauses in the policy expressly beginning with the words "this entire policy shall be void," or "this company shall not be liable," and stating the particular instances in which the policy shall be void or the company not liable. At least sixteen contingencies are named in which the policy shall be void, and at least thirteen in which the company shall not be liable. The failure to furnish the statement within sixty days is not among these contingencies. The matter referring to the statement is in a different clause from any of those contingencies, and the clause in which it occurs does not contain any words of nonliability or avoid-

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ance. If the policy was to be avoided or the company not liable in case of failure to furnish the statement in sixty days, why did not the policy so state, when it did so state in so many other contingencies?

This court and many others have stated that in case of doubtful meaning a policy should be construed in favor of the insured.

Forfeitures are not favored, and courts do not declare one by implication.

The policy does not expressly provide that the loss shall not be payable unless the statement is furnished within sixty days, but it does provide that the loss shall not become payable until sixty days after the statement or proofs of loss are received. In view of all the foregoing considerations, it must be held, in accordance with what seems to be the rule under the weight of recent authority, that the failure to furnish the statement within sixty days merely postpones the time of payment to the specified time after it was furnished and does not defeat recovery; the action having been commenced after sixty days after the statement was furnished and within twelve months after the fire. Insurance Co. v. Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916; Indian, etc., Bank v. Hartford F. Ins. Co., 46 Fla. 283, 35 South. 228; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Mason v. St. Paul, etc., Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; Flatley v. Phœnix Ins. Co., 95 Wis. 618, 70 N. W. 828; Welch v. Fire Assoc., 120 Wis. 456, 98 N. W. 227; So. F. Ins. Co. v. Knight, 111 Ga. 622, 36 S. T. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; Gerringer v. N. C. Home Ins. Co., 133 N. C. 407, 45 S. E. 773; Rheims v. Stand. F. Ins. Co., 39 W. Va. 672, 20 S. E. 670; Munson v. Ger. Ins. Co., 55 W. Va. 423, 47 S. E. 160; Taber v. Royal Ins. Co., 124 Ala. 681, 26 South. 252; Allen v. Mil., etc., Ins. Co., 106 Mich. 204, 64 N. W. 15; Insurance Co. v. Owens, 69 Kan. 602, 77 Pac. 544. It is a fact that respectable authorities have announced a different rule. The weight of recent authority, however, supports the rule as announced. 13 Am. & Eng. Encyc. of Law (2d Ed.) 329; 4 Cooley, Briefs on Ins., p. 3369; 1 Clement, Fire Ins., p. 201, rule 9; 4 Joyce on Ins., § 3282.

There are other errors briefly referred to by defendant. It would not be profitable to discuss these. The main contentions have been answered, and, finding no error, the judgment is affirmed.

Judgment affirmed.

CAMPBELL, C. J., and GARRIGUES, J., concur.

Decision No. 1432.

GARLICK v. MORLEY.

(Supreme Court of Wisconsin. October 3, 1911.)

132 N. W. 601.

PRINCIPAL AND AGENT.

One may make another his agent by ratifying the latter's assumption in a transaction, and thereby become liable to the latter and to a third person with whom the latter dealt; and such ratification may occur when a person, without authority in

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fact from his principal, pretends to represent the principal, and to employ a subagent, or may occur where there is no intermediary.

A ratification by a principal of the unauthorized acts of his agent may be shown by carrying out the contract made by the agent with another and accepting the benefits therefrom; but there can be no ratification without action by the principal, with knowledge of the facts.

Where one apparently clothes another with authority to represent him generally, or in a particular line of business, he is bound by contracts made by the latter within the scope of apparent authority, including the making of subagency contracts.

Whether one was the agent of another in the sale of corporate stock, so as to justify a recovery from the latter for services rendered, held under the evidence for the jury.

Where the issue was whether defendant directly or through an agent employed plaintiff as agent to sell corporate stock, and there was evidence that a general agent of defendant, with authority to employ agents, or assuming to have such authority, employed plaintiff, who rendered services in selling the stock, and defendant claimed that plaintiff acted for the benefit of the corporation or the agent, and not for him, a charge that if plaintiff, without authority from defendant, made a contract for the benefit of defendant, who with full knowledge of the facts accepted the benefits, he was liable to plaintiff, but if defendant did not employ plaintiff, nor authorize any one to employ him, and the contract made by plaintiff was not for defendant's benefit, and he did not ratify it, but it was for the benefit of the corporation, or of a third person, the verdict must be for defendant, sufficiently submitted the issue.

Appeal from Municipal Court of Beloit; Charles D. Rosa, Judge.

Action by S. M. Garlick against Richard A. Morley. From a judgment for plaintiff, defendant appeals. Affirmed.

Action on contract. These were the facts alleged: January 15, 1910, plaintiff and defendant mutually verbally agreed for the former to act as agent of the latter in selling corporate stock in the Nevada & Eastern Land Company under the direction of Wright & Palmer as general agents in charge of the matter, and receive for his services $1.25, per share of stock sold by him or with his assistance. Pursuant thereto plaintiff sold 1,000 shares of the stock, defendant receiving all proceeds, and thereby becoming indebted to the former in the sum of $1,250, payment of which has been refused.

The defendant answered by general denial.

The cause was submitted to a jury, resulting in a verdict for the full amount of plaintiff's claim, and judgment was rendered accordingly.

Woolsey & Arnold (Jeffris, Mouat, Oestreich & Avery, of counsel), for appellant. Nolan, Adams & Reeder, for respondent.

MARSHALL, J. (after stating the facts as above). If respondent acted as agent of appellant in selling the stock, the evidence shows he was concerned in selling, either by defendant's previous authorization, directly or indirectly, or he assumes to have such agency in the matter and such assumption was subsequently ratified by appellant, he was entitled to recover.

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One may make another his agent by ratifying such other's assumption in the matter, and thereby become liable both to such other and to the third party with whom he deals, as well as by an original contract of employment. Such ratification may occur as well when a person without authority in fact from the principal assumes to have it, under another falsely pretending to represent the principal and to employ a subagent, as where there is no intermediary in the matter. True, there can be no ratification within the meaning of these rules without action on the part of the principal based on knowledge of the facts; but the ratification may appear circumstantially as well as expressly. It may be presumed by conduct such as by carrying out the contract and accepting the benefits in like manner as if the person assuming to be authorized to represent him had authority in fact, he at the time of such apparent approval having knowledge of all the essential facts, and particularly the assumption of agency. These principles are very familiar. It is not understood there is any controversy in respect thereto between counsel. Morse v. Ryan, 26 Wis. 356; Kickland v. Menasha Wooden Ware Company, 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831; Carpenter v. Momsen, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692; McDermott v. Jackson, 97 Wis. 64, 72 N. W. 375; Mariner v. Oconto Land Co., 142 Wis. 531, 126 N. W. 34.

Another principle bearing on the case is this: If a person actually or apparently clothes another with authority to represent him generally or in a particular line of business, he is bound by whatever contract such other may make within the scope of the actual or apparent authority, including the making of sub-agency contracts. McDermott v. Jackson, 97 Wis. 64, 72 N. W. 375.

The main contention on the part of counsel for appellant is that the principles above stated were not rendered applicable to the case by competent evidence, and that, in some respects, they were not accurately and intelligently given to the jury.

We cannot agree with counsel as to there being no evidence to invoke application of the stated principles. The record, as we read it, is quite decidedly otherwise. There is evidence tending to show that appellant was substantially the only one interested in realizing on the corporate stock; that he was president of the corporation, owned the stock and was entitled to all proceeds thereof, less expenses of sales. There was also evidence tending to show that one Wright was defendant's general agent to sell the stock with authority, express or implied, to employ assistants and fix their compensation; that respondent visited appellant and was then requested to assist him in the stock business and referred to Wright as the person having charge of the whole matter; that pursuant thereto he agreed with Wright as appellant's representative and rendered the services in controversy accordingly — the latter taking part in the negotiations leading up to the particular sale of stock. True, there was evidence that respondent was not to have any commission for sale of the one lot of stock in question, but it was not all one way by any means. True, also, there was evidence tending to show that respondent was the agent of Wright, but ample evidence tending to show that he was the agent of appellant — evidence in the whole to carry the case to the jury.

Complaint is made because the court admitted in evidence a written agreement, negotiated by plaintiff, or by his assistance, for the sale

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of stock, the writing purporting to have been executed on the part of appellant by Wright as agent. It is insisted that the contract was neither authorized by appellant nor ratified by him, at least as regards any agency of respondent in the matter; that he was not present when it was signed and did not know of its making or existence. It may be a proper foundation was not seasonably laid for introducing the paper in evidence. If so, the error was cured, subsequently, by proof that appellant knew of the arrangement embodied in the writing, because a party to it, carried it out in exact accordance with its terms and received, without deductions, the full consideration paid for the stock. Moreover, the reception of the evidence was non-prejudicial because of the fact that the verbal arrangement embodied in it appeared in evidence without objection.

Complaint is made because of the exclusion of two written contracts, offered in evidence in behalf of appellant, which tended to show, as claimed, that Wright, in selling the stock, acted for the Nevada & Eastern Land Company, and that respondent was either agent for the company or Wright, and not for appellant. We need not say more in respect thereto than that all matters embodied in the writings were testified to without objection, and, therefore, appellant was not prejudiced because the papers were not received in evidence. Conceding all such papers fairly indicate, they do not exclude the idea that respondent acted as appellant's agent and was authorized to do so.

The writing first mentioned purported to show a sale by appellant of 1,120 shares of the corporate stock. As we have seen, he knew of the sale whether he knew of the writing or not. He had the benefits of the transaction and knew respondent acted in bringing it about. The claim is that respondent assisted as agent of Wright or of the corporation. But there was evidence tending to show, as before indicated, that Wright was the general agent for appellant with authority to employ respondent, or he at least assumed to have such authority and was warranted in doing so, from respondent's viewpoint, and that pursuant thereto the latter aided in making the sale contract and appellant carried it out. In respect to that situation the trial court gave several instructions, and among them this:

"If you find that the plaintiff without authority from defendant made a contract with the Harvard parties for the benefit of the defendant and that the defendant subsequently with full knowledge of all the facts accepted the benefits of such contract and carried it out, then defendant would be liable to the plaintiff for the commissions on the sale.

"If, on the other hand, you find that the defendant did not employ the plaintiff and did not authorize Wright or any one else to employ the plaintiff for him and that the contract made by the plaintiff with the Harvard parties was not for his benefit and he did not ratify the same, but was for the benefit of the Nevada & Eastern Land Company or of Wright or of some other person, then you must find that the defendant is not indebted to the plaintiff."

It is said the giving of such instructions was prejudicial error because there was no evidence upon the subject — with which we cannot agree — and because the jury were thereby told that acceptance of the benefit of a contract made by respondent, acting as a personal employee of Wright — that is ratification of Wright's sale for the land

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company — was sufficient to render appellant liable for the compensation Wright agreed respondent should have, though Wright's arrangement with respondent contemplated only services personal to himself or the land company. It does not seem there is any very good ground for such claim. The trend of the whole instructions negatives it, and the quoted language unmistakably does so. The jury were plainly told, several times, that respondent could not recover unless they were satisfied from the evidence he acted by contract made directly with appellant, or indirectly by his authority, actual or assumed, followed by ratification with knowledge of the facts — that is knowledge, among other things, that respondent performed the services assuming to act for appellant by authority of Wright. That seems very plain. The jury could not have understood the instruction otherwise. Seemingly, in order to leave no room for misunderstanding, the first clause the court added the language, "if on the other hand" — or in other words, if you find, as defendant claims, he "did not employ the plaintiff and did not authorize Wright or any one else to employ the plaintiff for him and that the contract" "was for the benefit of the Nevada & Eastern Land Company or of Wright, or some other person, then you must find for defendant." Rightly understood the instruction quoted and others of a similar character are free from error. They fairly embody principles stated at the beginning of this opinion and were applicable to the evidence.

True, the explanatory clause, in the quoted instruction, is not to be commended in respect to the frequent use of the conjunctive form of expression, though, in the whole, it is correct. However it may, possibly, though not, probably, have been regarded by the jury as limiting the broad meaning of the first clause instead of making a full explanation of it. While, as said, it is correct as a whole, it would have been correct and more fully explained the preceding clause if instead of the frequent use of "and" the court had said — if, on the other hand, you find that the defendant did not employ the plaintiff or authorize Wright or any one else to employ him, or that the contract made by plaintiff with the Harvard parties was not for defendant and ratified by him, but was for the benefit of the Nevada & Eastern Land Company, or of some other person, then you must find that the defendant is not indebted to the plaintiff.

Nothing further need be said. We quite agree with appellant's counsel that the real issue was whether defendant employed plaintiff, or ratified his employment, as agent to sell the stock, but cannot agree that there was no evidence tending to sustain respondent's side of that issue, and no instruction upon the point. On the contrary, as we read the instructions, the jury were informed plainly and with particularity upon that precise point. They were fenced about by negative and affirmative instructions, as well as being told in the most direct manner, the precise necessary status of plaintiff to entitle him to recover.

Appellant's criticisms of the trial not included in what has been said are rendered inconsequential thereby or otherwise are not of sufficient moment to warrant further extending the opinion.

Judgment is affirmed.

BARNES, J., took no part.

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Decision No. 1433.

T. G. BUSH GROCERY CO. v. CONELY.

(Supreme Court of Florida, Division B. May 23, 1911.)

55 South. 867.

PRINCIPAL AND AGENT — ESTOPPEL.

Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority.

Whether or not an act is within the scope of an agent's apparent authority is to be determined, under the foregoing rule, as a question of fact, from all the circumstances of the transaction and the business.

Where one of two innocent persons must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences.

If one holds another out to the world and accredits him as his agent, he is bound by that person's acts done within the scope of the agency thus given him. In such cases the question is, not what authority was intended to be given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in believing was given to him.

(Syllabus by the Court.)

Error to Circuit Court, Jackson County; J. Emmet Wolfe, Judge.

Action by the T. G. Bush Grocery Company against T. W. Conely. Judgment for defendant, and plaintiff brings error. Affirmed.

Paul Carter, for plaintiff in error. Price & Lewis and C. L. Wilson, for defendant in error.

PARKHILL, J. The plaintiff in error sued the defendant in error in the Circuit Court for Jackson county for goods, wares, and merchandise sold and delivered. Upon pleas of never was indebted, payment, and release the jury returned a verdict for the defendant. Upon writ of error it is contended that the verdict is contrary to the evidence.

The evidence tended to show the plaintiff was a wholesale grocer in Mobile, Ala., and the defendant a retail dealer in Marianna, Fla. J. H. Parker was a traveling salesman for the plaintiff company. His authority was to sell goods at prices as instructed by the Bush Company. The plaintiff admitted that, while Parker had no specific authority to collect money due for goods sold by him, yet "he did collect and we didn't object to it. We recognized his authority to collect by not objecting to it."

Mr. Bush testified that Parker was not authorized to give rebates on the bills of goods sold, and the plaintiff had no actual knowledge that Parker was allowing rebates to the defendant. Mr. Bush admitted: "Some goods were billed out, subject to discount, which, of course, we allowed. . . . We allowed them for short payments —

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weekly payments, for instance." The statements of discount offered in Conely's account, as it appeared on Bush Company's books offered in evidence, shows the Bush Company allowed Conely deductions, sometimes called "discounts," and other times called "rebates," ranging from two to twelve and one-half per cent., and these discounts or rebates were allowed upon fifty-eight out of one hundred and twenty-five purchases made by defendant from the plaintiff.

The first bill of goods in the account sued for was sold by Parker to the defendant on the 15th day of February, 1906, and Mr. Parker continued to sell to the defendant for the plaintiff during 1906, 1907, and 1908, and collected every few days the full amount due thereon less the rebate. The defendant made 125 payments within 156 weeks, as the statement of accounts in evidence shows. These bills were all receipted by Mr. Parker, except the last one, that the plaintiff testified he paid. The plaintiff sent statements of accounts for the goods at least every three months. The statements contained items of original entry and did not show rebates allowed.

A. P. Bush testified: "We have books of account showing the account of the plaintiff with Conely. The charges correspond on our books with the bills on his books. The gross amount on his books correspond with the charges on our books. His books show all these bills settled. They show them settled by cash and rebates. J. H. Parker allowed him those rebates. At the time Parker quit us, we claimed a balance from Conely. We sent a man named J. P. Moore to sell goods. He is the man who receipted and signed these last bills. The exact amount of discounts is $367.10; the bill of November 19, 1908, $95.10, added, making a total of $462.20."

The defendant made no response to statements sent him by the plaintiff. "The remittance was not made direct to the house by Mr. Conely. Mr. Parker was the salesman at that time. He sold the goods and collected for them." "Mr. Parker was short cash with the plaintiff. The entire amount of his shortage was $2,900."

The defendant testified that he bought the goods from J. H. Parker, representing T. G. Bush Grocery Company; that he paid Parker for the goods he bought. None of the bills are still unpaid. The defendant offered in evidence receipts for payment of goods bought. The bills were marked "Paid," and signed "T. G. Bush Grocery Co." The defendant testified that Mr. Parker told him he could meet terms on prices and wanted the business. The defendant would show prices from various places cheaper than Parker's, and Parker would say, "I will meet those prices." "When the bill came, I paid each week. When I bought the goods I agreed on a certain price, and paid him according to that price. That is what made those discounts in the tobacco and snuff, and, the sixty-day goods being paid promptly, I was allowed a two per cent. discount on snuff and things of that kind — on these accounts. At different times I suppose I did take off $367.10 discount. I got statements while I was doing business with the house. I spoke to Mr. Parker about it."

We have only partially stated the testimony, but enough of it has been set out for our present purpose.

Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with busi-

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ness usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086. Whether or not an act is within the scope of an agent's apparent authority is to be determined, under the foregoing rule, as a question of fact, from all the circumstances of the transaction and the business. Where one of two innocent persons must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. People's Bank of Belleville v. Manufacturers' National Bank of Chicago, 11 Otto 181, 25 L. Ed. 907; American Process Co. v. Florida White Press Brick Co., 56 Fla. 116, 121, 47 South. 942.

If one holds another out to the world and accredits him as his agent, he is bound by that person's acts done within the scope of the agency thus given to him. In such cases the question is, not what authority was intended to be given to the agent, but what authority was the third person dealing with him justified from the acts of the principal in believing was given to him. Griggs v. Selden, 58 Vt. 561, 5 Atl. 504; 1 Am. Lead. Cas. 568, note; Story's Agency, § 127, and note 2.

We think the evidence was sufficient to support the finding that the defendant was justified in believing from the act of the plaintiff that Parker, the agent, was authorized to allow the rebates or discounts in question here. The plaintiff admitted that rebates were allowed for short payments — weekly payments; and the evidence shows that the defendant practically made weekly payments. The entries in the books of the plaintiff show that rebates were allowed the defendant on snuff, crackers, etc., varying in amounts from two to twelve and one-half per cent. How did the defendant know rebates would be allowed him? He could have known of this only through plaintiff's agent, Mr. Parker; for the evidence shows that the plaintiff did not see the defendant until after the transaction had come to a close. The agent allowed Conely the rebates, and the plaintiff ratified this action nearly sixty times, covering a period of nearly three years, during which time the defendant made purchases and payments on an average of practically every week. If the defendant had remitted directly to the plaintiff for these goods, the plaintiff could have called attention to any shortage in payments on account of discounts allowed by Parker; but this agent was permitted to collect moneys paid by defendant for the goods purchased. Thus the plaintiff left the entire transaction to its agent, and thus gave the power to do the wrong, and must bear the burden of the consequences. It is true the plaintiff sent statements to the defendant every three months, which statements, according to Mr. Bush's testimony, did not show rebates allowed, although the charges on the books of the company showed rebates allowed the defendant. Conely entered the invoice price on his books, and deducted therefrom the discounts allowed by Parker. Both parties, then, seem to have entered the invoice prices on the books, deducting the rebates or discounts, and Parker collected the invoice price, less the rebate, and this course of dealing continued, as we have seen, for about three years. It becomes a question for the

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jury in a case like this, where the principal, T. G. Bush Grocery Company, had voluntarily placed its agent in such a situation that the defendant, as a person of ordinary prudence, conversant with business usages and the nature of this particular business, was justified in presuming that such agent had authority to allow the rebates or discounts in question. The jury decided this question in the affirmative, and, the evidence being ample to sustain this finding, the principal, T. G. Bush Grocery Company, will be estopped as against the defendant from denying the agent's authority.

From what we have said, the court properly refused to give the affirmative charge for the plaintiff.

We think the law was correctly stated in the charges given.

There was no exception to the ruling of the court sustaining objection to the introduction of the original orders for merchandise.

Finding no reversible error, the judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

Decision No. 1434.

FISHER v. LUTZ.

(Supreme Court of Wisconsin. October 3, 1911.)

132 N. W. 592.

PARENT AND CHILD — FRAUDS, STATUTE OF.

Plaintiff sold a piano to defendant's infant son, who did not state that he bought as agent, but merely stated that he had to consult his folks before buying. A receipt for a part payment was issued to the infant in his own name, and plaintiff took the infant's individual note for the balance, and brought suit thereon, which he discontinued when learning of the infancy. Defendant had paid for necessary articles for use on his farm bought by the infant son. Held, not to show that the son acted as the agent of defendant in making the purchase, or that plaintiff was justified in assuming that he so acted, precluding a recovery from him for the balance due.

Where a son did not assume to act as the agent of defendant in a transaction, and he had no authority to act therein, there can be no ratification.

An oral promise of a father to pay a debt due from his infant son is void under the statute of frauds.

Appeal from Circuit Court, Shawano County, John Goodland, Judge.

Action by A. B. Fisher against Herman Lutz. From a judgment of dismissal, plaintiff appeals. Affirmed.

On or about October 1, 1908, Arthur Lutz, a minor, son of the defendant herein, was living with his sister on his father's farm, and doing the work thereon under the supervision of his father, who

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visited the place from time to time. Said Arthur Lutz negotiated with the plaintiff for the purchase of a piano, the price of which was $200. The piano was delivered at said farm, and some time in October, 1908, he paid $10 to apply on the purchase price thereof, and on November 7, 1908, signed a promissory note for the balance, and later paid one year's interest thereon; no further payments having been made. This action is brought to recover the amount due for the piano which plaintiff claims was sold to the defendant through his son, who was acting as his agent. By his answer, defendant disclaims any liability, and denies all the allegations of the complaint. At the close of the testimony, the court directed a verdict for the defendant, dismissing plaintiff's complaint, and from the judgment entered upon such verdict plaintiff appeals.

P. J. Winter, for appellant. Eberlein & Eberlein, for respondent.

BARNES, J. (after stating the facts as above). The appellant contends (1) that Arthur acted as the agent of the defendant in making the purchase, and (2) that defendant ratified the purchase by his subsequent conduct.

1. The plaintiff admitted that Arthur did not tell him that he was buying the piano for or as the agent of his father, but testified that he inferred that Arthur was doing so, because he said he would have to consult his folks before buying. Plaintiff issued a receipt to Arthur for a part payment made by him, and took his individual note for the balance, and at one time commenced a suit on this note against Arthur, but discontinued it when he learned that the maker of the note was a minor. It was shown that Arthur had purchased some necessary articles for use on the farm, and that his father had paid for them. The testimony, construed most favorably to the plaintiff, fails to show that it was his intention to sell the piano to the defendant, rather than to the son, and wholly fails to show that the son acted as the agent of the defendant in making the purchase, or that plaintiff was justified in believing or assuming that he acted as such agent. No jury question was raised by the evidence on the issue of agency.

2. The boy, Arthur, not having acted or assumed to act as the agent of his father in the transaction, and having no authority so to do, it is difficult to see how there is any question of ratification in the case. "In order that an unauthorized act may be capable of ratification, it is necessary that it should have been performed by one acting as an agent on behalf of another as principal." 31 Cyc. 1251, and cases cited. If we had the case of an agent acting in excess of his authority, but nevertheless assuming to act as agent, a promise to pay by the principal might well amount to a ratification. But we have no such case. At best, all the proof tended to show was an oral promise on the part of the defendant to pay his son's debt, which promise was clearly void under the statute of frauds.

Judgment affirmed.

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Decision No. 1435.

ELLIOTT et al. v. WILSON.

(Superior Court of Delaware. Sussex. April 12, 1911.)

80 Atl. 35.

QUASI-CONTRACT — WORK AND LABOR.

Where a contract for services has been performed, and the wages only remain to be paid, the common indebitatus assumpsit count for work and labor lies for the recovery of the wages, though generally, where there has been a special agreement, the parties must resort thereto.

Where either party to a contract for services has partially performed, but has been prevented from completing, the work by the default of the other party, the party prevented may recover on the common counts and in quantum meruit for his partial services up to the time he was stopped, and obtain a payment for the reasonable value of the services.

Where, in an action by a building contractor, suing for the reasonable value of the work done up to the time he was prevented by the owner from completing the work, the issue was whether the owner had paid for all the services rendered, the contract could not be considered by the jury in determining the question.

Where, in an action by a building contractor for the reasonable value of services rendered and materials furnished up to the time he was prevented by the owner from completing the work, the evidence showed that building materials prepared by the contractor were used by the owner after the contractor quit work, the jury, in determining the right of the contractor to recover, need not consider whether he made the materials according to the specifications annexed to the contract.

Action by Harry E. Elliott and another, trading as H. E. Elliott & Son, against Samuel J. Wilson, trading as S. J. Wilson & Son. Charge of court.

Summons case (No. 32, June term, 1910), brought to recover the sum of $348.93 for work and labor and for the use of a machine, alleged by the plaintiffs to have been performed and used by the defendant in making concrete building blocks for the erection of a building for the defendant. See further facts in the charge of the court.

Argued before BOYCE and CONRAD, JJ.

Robert C. White and James M. Tunnell, for plaintiffs. John M. Richardson and Daniel J. Layton, Jr., for defendant.

BOYCE, J. (charging the jury). Gentlemen of the jury: This is an action of assumpsit, on the common counts, brought by Harry E. Elliott and Samuel W. Elliott, trading as H. E. Elliott & Son, against Samuel J. Wilson, trading as S. J. Wilson & Son, to recover the sum of $348.93, as originally stated, for work and labor and for the use of a machine, alleged by the plaintiffs to have been performed and used by the defendant in making concrete building blocks for the erection of a building for the defendant. It appears from a contract in writing between the parties which is in evidence before you by consent, that

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the plaintiffs had contracted to erect a building with a cellar for the defendant in the town of Milton, last year.

It is conceded that a dispute arose between the parties as to the proper interpretation and meaning of the specifications respecting the thickness and mode of construction of the basement wall of the building. And the plaintiffs maintain that in consequence of the dispute or disagreement, they were prevented from proceeding with and completing the building.

This action was not brought to recover damages for a breach of the contract, but to recover compensation for the work and labor alleged to have been performed by the plaintiffs and their workmen under the contract prior to the time when, as they claim, they were prevented from proceeding further on the building, and for other demands set forth in their bill of particulars, which is as follows:

"Plaintiff's Bill of Particulars.

1910.			
May 11.	To 4,500 cement blocks at 8 cts		$360 00
May 11.	To 13 lintels and sills at $1.00		13 00
May 11.	To work and labor in excavating and erecting forms for foundation		32 84
Sept. 3.	To use of block machines from May 11 to Sept. 3, 1910, 100 days, at $2.00		200 00
	Total		$605 84

Cr.

1909.			
Dec. 20.	By cash		$10 00
1910.			
March 25.	By cash		$25 00
April 2.	By cash		50 00
April 9.	By cash		40 00
April 16.	By cash		26 00
April 24.	By cash		20 00
April 30.	By cash		38 00
May 7.	By cash		30 00
May 14.	By cash		17 91
	Total		$256 91

Balance due, $605.84 — $256.91, or $348.93."

At the close of the testimony on both sides counsel for the plaintiff restated the demand of the plaintiffs as follows:

4,500 blocks at 8c	$360 00
13 lintels	13 00
Work on excavating	32 84
10 days' use of block machines	20 00
	$425 84

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Cr.

By cash payments	$256 91
" draft	30 49
" freight	3 93
" cash	50
" freight	2 03
" C. G. Waples	6 44
" proportion of rent	10 00
	$310 30
	$115 54

The plaintiffs' demand as restated is $115.54.

As a general principle, where there has been a special agreement, the parties must resort to their remedies upon and seek their redress under it, and cannot proceed upon the common counts; but when the contract of service has been entirely performed and executed under such a contract, and the wages only remain to be paid for it, the common indebitatus assumpsit count for work and labor may be maintained for the recovery of the money.

So, too, where either party has partially performed the special agreement pursuant to the terms of it, but has been prevented from completing or perfecting it, by the default or misconduct of the other party, the party so interrupted and prevented from completing it may recover on the common counts and in quantum meruit, for his partial services up to the time when he was stopped, whatever they were reasonably worth. McGartland v. Steward & Clark, 2 Houst. 277; Hurlock v. Murphy & Copperthwaite, 2 Houst. 551.

The contract between the parties, in evidence, can be of no assistance to you in coming to a determination upon the issue of fact in this case, under the pleadings and evidence. The plaintiffs' demand is based upon the value of the work and labor to the defendant, alleged to have been performed by them and their workmen, from the time the work on the building was commenced to the time they cased to work thereon, as well as upon the value of the use of the machine to the defendant, alleged to have been retained and used by him in making the necessary additional blocks for the completion of the building after the plaintiffs had ceased to work thereon.

The various items and character of the plaintiffs' demand is disclosed by the restatement of their bill of particulars, which we have read to you.

You need not consider the cost of the cement used in making the building blocks and lintels, either before or after the plaintiffs left off working on the building, for it is admitted by them that the defendant paid for the same; nor need you consider whether the plaintiffs mixed and made the blocks and lintels according to the specifications, annexed to the contract between the parties, for it is admitted by the defendant that he used them in the erection of the building. He also admitted that he used the block machine ten days according to the claim of the plaintiffs in the restatement of their demand.

The vital questions for your determination, to be ascertained by you from the evidence, are: (1) What were the services rendered by the

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plaintiffs, and the use of the machine by the defendant, reasonably worth to the defendant? (2) Has the defendant fully paid the plaintiffs for the services rendered and for the use of the machine?

The plaintiffs admit that the defendant did, from time to time, make payments on account of the work and labor performed, but they claim that there remains a balance due them according to their demand.

The defendant insists that he has fully paid the plaintiffs for all services rendered and that he made advances to and for them, at their request, in excess of all demands against him.

The contentions of the parties, as you have heard them, are questions of fact which you must determine from all the evidence before you, throwing any light upon the plaintiffs' demand and the payments made by the defendant to and for the plaintiffs, on account of their demand.

It is for you to find from the evidence whether the defendant is indebted to the plaintiffs, and, if so, for what amount.

You are the judges of the weight and value of the testimony of the witness. And where the testimony is conflicting, as in this case, you should reconcile it if you can; if you cannot, you should accept that part of the testimony which in view of all the circumstances you deem most worthy of credit, and reject that which you deem the least worthy of credit.

Your verdict should be either for the plaintiffs for such sum as you find to be due them, not in excess of the amount claimed, or for the defendant, according as the evidence preponderates.

Decision No. 1436.

BALL et al. v. SHEPARD et al.

(Court of Appeals of New York. May 30, 1911.)

95 N. E. 719.

MISTAKE OF FACT.

One who pays money under a mistake of fact to one who is not entitled thereto may sue to recover the money.

The rule that one who pays money under a mistake of fact to one not entitled thereto may recover it back is subject to the limitations that the mistake must arise in the transaction between the parties to the action, and there can be no recovery where, by reason of the payment, the party receiving it has so changed his position, to his prejudice, that it would be unjust to require him to repay.

Where one under a mistake of fact pays money to another who does not share in the mistake, and who receives the money in good faith in the regular course of business and for a valuable consideration, he cannot recover back the money.

A third person purchased bonds from defendant, a stock broker, and directed that they should be sent to plaintiff, also a stock broker, who would pay for them. Plaintiff delivered a check to defendant in payment, relying on the third person's fraudulent misrepresentations. The third person was employed by plaintiff as a "customers man" at a regular salary, but the third person was also engaged on his own account in the sale of bonds and unlisted securities, and in such transactions

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he sometimes "cleared" through plaintiff. Held that, after the payment of the check, plaintiff could not recover from defendant the money paid; the defendant not being chargeable with the fraud of the third person.

Where a stock broker purchaser bonds from another stock broker through a third person fraudulently misrepresenting the facts to the former broker, who delivered to the latter broker a check for the price, and check was paid in the usual course of business without fraud or collusion, the former broker could not recover from the latter broker the amount of the check.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles E. Ball and others, copartners, composing the firm of Ball & Whicher, against Edward D. Shepard and another, copartners, composing the firm of E. D. Shepard & Co. From a judgment of the Appellate Division (135 App. Div. 612, 120 N. Y. Supp. 830), affirming by a divided court a judgment for plaintiffs, defendants appeal. Reversed, and new trial granted.

L. Laflin Kellogg, for appellants. H. Aaron, for respondents.

WERNER, J. The plaintiffs and defendants, respectively, are firms of brokers, each doing business in the city of New York under the form of a limited partnership. The action is brought to recover the sum of $24,906.25, which the plaintiffs claim to have paid to the defendants under a mistake of fact. The amended complaint, which rather vaguely presents the transaction in which this payment was made, alleges that in the course of the plaintiffs' business with the defendants and others the plaintiffs frequently receive at their office various stocks and bonds which have been purchased or ordered by parties for whom the plaintiffs "clear," and upon the delivery thereof the plaintiffs pay for the same; that transactions of a similar character were of frequent occurrence between the plaintiffs and the defendants, and that this course of business was well known to the defendants; that on July 28, 1908, the defendants sent to the plaintiffs, in the regular course of business thus described twenty-five bonds of the Yankee Fuel Company, each of the face value of $1,000, and requested as payment therefor the sum of $24,906.25; that in the belief that these bonds had been bought by one Spingarn and that he had arranged to remit to the plaintiffs the purchase price thereof, and relying upon a representation to that effect, the plaintiffs received the bonds and gave the defendants their check for the purchase price; that, in fact, Spingarn had not bought the bonds, and had not arranged to remit the purchase price thereof, as the plaintiffs had erroneously believed; that the plaintiffs, having thus made payment to the defendants under a mistake of fact, tendered back the bonds, and demanded a return of the purchase price, and that the defendants refused to comply with the demand.

The transaction, as disclosed by the evidence, is characterized by several features which are not mentioned in the complaint. From the testimony introduced by the plaintiffs it appears that one Valentine was employed by them as a "customers man" at a regular salary; that Valentine was also engaged on his own account in the sale of bonds and unlisted securities; that in these transactions he sometimes

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"cleared" through the plaintiffs and again through others. On the morning of July 28, 1908, Valentine informed one of the plaintiffs that he had put through a $25,000 bond deal. An hour later the cashier of the plaintiffs reported that the defendants had sent over twenty-five bonds, and the cashier asked Mr. Chinn, one of the plaintiffs, if he was to give the messenger a check. Mr. Chinn asked the cashier if he had received a check "from the other end," and the cashier replied in the negative. Thereupon the cashier was instructed to hold the matter until Mr. Chinn could see Valentine about it. When Valentine came in, Mr. Chinn said to him, "There are twenty-five Yankee Fuel bonds over here from Shepard & Co., where is your money from the other end?" Valentine replied: "Why, that is all right, Mr. Chinn, I have sold those bonds to a Mr. Spingarn of Spingarn Bros. He is an uptown milliner. He owns the building he is in. I have sold him over $200,000 bonds in the past two or three years. In fact I have sold him $280,000 to be accurate. There is no use holding Shepard up for the payment of these bonds because a certified check will be down here in an hour from Mr. Spingarn." Upon these representations made by Valentine, the plaintiffs' cashier was directed to draw the check of the plaintiffs payable to the order of the defendants. The check was signed by Mr. Chinn and delivered to the defendants' messenger, who then gave up the bonds. When it subsequently transpired that Valentine had not sold the bonds to Spingarn, or at least that Spingarn disclaimed any transactions with Valentine, plaintiffs tendered back the bonds to the defendants, and demanded a return of their check with the result already stated.

The foregoing is a fair synopsis of the case as it stood when the plaintiffs rested and the defendants moved for a dismissal of the complaint. When this motion had been denied, the defendants presented to the court the other side of the transaction, which, as may be surmised, relates wholly to the dealings between the defendants and Valentine.

From the testimony given on the part of the defendants, it appears that on the morning of July 28, 1908, Valentine went to the office of the defendants and made an offer of ninety flat, without stock, for twenty-five Yankee Fuel bonds. The employee to whom this offer was made communicated it to the cashier, who called up a Mr. Lincoln in the Philadelphia office, and received word that the deal might be put through on that basis. At Valentine's request the defendants' cashier was instructed to bill the bonds to the plaintiffs at ninety-eight and interest. The bonds were sent to the plaintiffs by a messenger with instructions to get a check on delivery, and to have it certified at once. Within an hour after the bonds had been delivered to the plaintiffs, and their certified check had been given to the defendants, Valentine again went to the office of the defendants and there received a check for his profit in the transaction, which represented the difference between ninety, at which he had bought, and ninety-eight, at which he had presumably sold. It did not appear that the defendants knew anything about Spingarn, or that they had any reason to suspect that Valentine had made any representations to the plaintiffs, false or otherwise. Neither was it shown that the defendants had any knowledge that the plaintiffs had given their check in the mistaken belief that the bonds had been sold to Spingarn.

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Having thus briefly stated what the record discloses, it may be useful to recapitulate a few of the salient facts for the purpose of classifying the transaction. The defendants had bonds to sell. Valentine desired to purchase. A price was agreed upon. At Valentine's request, the bonds were billed to the plaintiffs, who had agreed to "clear" for him; that being the technical term used in cases where one person sells to another and a third party temporarily advances the money with which to facilitate the transaction. The bonds were delivered to the plaintiffs, who gave their cleck in payment. By way of punctuation, it may be pertinent at this point to observe that, if there were no other facts to characterize the transaction, this would clearly have constituted a binding purchase by Valentine and a valid sale by the defendants. But we must assume that Valentine had falsely represented to plaintiffs that he had sold the bonds to Spingarn, whose check would be forthcoming, and that the plaintiffs believed that to be the fact when they gave their check to the defendants. Thus it is clear that, as between Valentine and the plaintiffs, there was fraud on the part of the former, and mistake on the part of the latter. Upon proof of this fraud and mistake it is obvious that the plaintiffs would have had a good cause of action against Valentine; but we are at a loss to understand upon what theory the plaintiffs can hold their recovery against the defendants. It is urged that the plaintiffs paid for the bonds under a mistake of fact, and, therefore, are entitled to follow the purchase price into the hands of those who received it.

This claim is predicated upon the principle that a party who pays money under a mistake of fact, to one who is not entitled thereto, must in equity and good conscience be permitted to get it back. That is a well-recognized principle of law; but we think it has no application to the case at bar. The simplest statement of the rule invoked by the plaintiffs is that, if A pays money to B upon the erroneous assumption of the former that he is indebted to the latter, an action may be maintained for its recovery. The reason for the rule is obvious. Since A was mistaken in the assumption that he was indebted to B, the latter is not entitled to retain the money acquired by the mistake of the former, even though the mistake is the result of negligence. That is the general rule laid down in Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Union Nat. Bank of Troy v. Sixth Nat. Bank of New York, 43 N. Y. 452, 3 Am. Rep. 719; National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232; Lawrence v. American Nat. Bank, 54 N. Y. 432; and Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161, which are relied upon by the plaintiffs. The difference between the case at bar and those relied upon by the plaintiffs is concretely illustrated in Lawrence v. American Nat. Bank, supra. There the plaintiffs, being indebted to P. on account, made out a statement of the account and paid to the defendant, the assignee of P., the amount which appeared to be due. It transpired that the plaintiffs had made a mistake in omitting to charge the defendant with $5,000 which they had loaned to P. and for which they were entitled to credit. Here it will be well to note that the reason of the rule which was applied in the Lawrence case must, of necessity, carry with it at least two limitations.

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One is that the mistake which is relied upon as the basis of recovery must arise in the transaction between the parties to the action; and the other is that even in such a case there can be no recovery if by reason of the payment the party receiving it has so changed his position to his prejudice that it would be unjust to require him to refund. Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n, 55 N. Y. 211, 213, 14 Am. Rep. 232, and Hathaway v. County of Delaware, 185 N. Y. 368, 370, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909. If circumstances do exist taking such a case out of the general rule permitting a recovery, the burden of proving them rests upon the party resisting the repayment. Mayer v. Mayor, etc., of N. Y., 63 N. Y. 455.

From what has been said, it is evident that the rule which we have been discussing must have its antithesis, and we find it in that class of cases in which money is paid by one party, who labors under a mistake of fact, to another party who does not share in the mistake, and who receives the money in good faith in the regular course of business and for a valuable consideration. Justh v. Nat. Bank of Commonwealth, 56 N. Y. 478; Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511; Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Hatch v. Fourth National Bank, 147 N. Y. 184, 41 N. E. 403; Goshen Nat. Bank v. State of New York, 141 N. Y. 379, 36 N. E. 316. That rule has been tersely and correctly stated by Judge Gray in Nassau Bank v. Nat. Bank of Newburgh, 159 N. Y. 456, 459, 54 N. E. 66, 67, as follows: "When money has been received by a person in good faith, in the usual course of business and for a valuable consideration, it cannot be pursued into his hands by one from whom it has been obtained through the fraud of a third person." And the reason for this latter rule has been well stated by Judge Andrews in Stephens v. Bd. of Education, supra, where he said: "It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmarks. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of the money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration." 79 N. Y. 187 (35 Am. Rep. 511). Perhaps the simplest illustration of this principle is to be found in Justh v. Nat. Bank of Commonwealth, supra, where the plaintiffs certified checks which had been obtained by fraud, were deposited with the defendant bank by the person committing the fraud, in the ordinary course of business, and were paid by the bank on presentation. In that case the court suggested that the plaintiffs were cheated, not by the defendant, but by the fraud

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of the parties to whom they gave their certified checks, and that the loss occasioned by that fraud could not be transferred to the defendant bank, which was an entirely innocent party. The checks there used were referred to by the court as money which came into the hands of the defendant "in the regular course of business, in a form as current as if it had been bank notes or United States currency," and the court concluded that, if in such a case, it could be followed because the party who paid it procured it fraudulently, "the transaction of business must stop, for no inquiry and no precaution could guard the receiver from responsibility." In the nature of things there are exceptions to this rule, as, for instance, in a case where an agent is intrusted with property which is disposed of by him in fraud of his principal, and where the property or its proceeds may be followed as far as either can be traced (Van Alen v. Am. Nat. Bank, 52 N. Y. 1, 8), but these are not germane to the present discussion, and they are mentioned only to obviate the possible misapprehension that we regard the rule by which the case at bar is controlled as one subject to no exception.

Thus it will be seen that the two classes of cases above referred to are divided by a line which is very narrow and yet well defined. In the first class, relied upon by the plaintiffs, the mistake of fact is usually one which arises inter partes, and, in order to justify a recovery in any such case, it must appear that the defendant was not, in the first instance, entitled to receive the money, and that his circumstances have not been so changed through its receipt as to render it unjust to compel him to refund. In the second class the mistake of the payor is usually superinduced by the fraud of a third person and the payee is not only ignorant of the fraud or mistake, but receives the money in good faith in the regular course of business and for a valuable consideration.

The mere statement of this rule seems at once to demonstrate the status of the case at bar. Here the defendants had agreed to sell the bonds to Valentine. The latter directed the former to send the securities to the plaintiff who would pay for them. Valentine bought the bonds and the plaintiffs advanced to him the purchase price which he was required to pay to the defendants. Let us suppose that Valentine's statement to the plaintiffs had been true and that Spingarn had in fact agreed to buy the bonds from Valentine, but had defaulted in his obligation to do so. In these circumstances the plaintiffs would surely have been confined to a recovery against Valentine. How is the situation changed because Valentine's statement was false? The plaintiffs were misled by this statement, and not by anything that was said or done by the defendant. That was the precise situation in Stephens v. Board of Education, supra, where the plaintiff took from a defaulting member of the defendant board of education a forged mortgage, the proceeds of which were received by the defendant in payment of the defaulter's debt to it, and disbursed by them in the regular course of business. The fact that in the case at bar the payment by the plaintiffs to the defendants was made by check is of no significance except as it might have enable the plaintiffs, had they seasonably discovered their mistake, to stop payment on the check. Once the check was paid, however, it was the same as though money had been paid in the first instance. In this respect the case at bar does not

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differ from Southwick v. First Nat. Bank of Memphis, supra, in which the bank had innocently and in the regular course of business paid a draft in respect of which there had been fraud by the drawer and mistake by the drawee. The case of Hathaway v. County of Delaware, supra, upon which both of the counsel in the case at bar seem to rely to some extent, is one which presents some features common to the class which follow the Justh case, but also some special circumstances which warranted a recovery. In that case, as in the case at bar, the payment was made by check which was drawn to the order of the defendant. In both cases, therefore, the defendants were chargeable with notice of the fact that it was the money of the plaintiffs which was being paid to liquidate the debt of a third person. But at this point there is an end of the parallel between the two cases. In the Hathaway case the check was made payable to the county of Delaware upon the faith of a note purporting to be the obligation of the county, but being in fact a forgery. The check was diverted from the only purpose for which it could lawfully have been made, and was used to pay the debt of a defaulting treasurer to the county, a purpose for which neither of the parties to the action had ever intended to give it currency. These facts, supplemented by the circumstance that the defendant's position had not been changed to its prejudice, were the controlling factors in the decision which upheld the recovery in that case. In the case at bar the check was applied to the identical purpose for which it was made. The plaintiffs knew that it was to go to the defendants in payment for bonds which Valentine had bought. Defendants delivered up the bonds, and obtained the money on the check. There was no mistake in the transaction as between the plaintiffs and the defendants, and the only mistake disclosed by the record is that the plaintiffs confided in a faithless employee and associate.

In this view of the controversy, it is apparent that there was no issue to submit to the jury, and that the one submitted was not in the case. The transaction between the parties could have given rise to but one legal issue, and that was whether the defendants were parties to the fraud of Valentine or the mistake of the plaintiffs. No such issue was either pleaded or proven. The complaint should, therefore, have been dismissed.

The issue submitted to the jury was whether the plaintiffs had purchased the bonds from the defendants, and that question was not in the case, for nothing of that kind is claimed by either party. And even upon that question, asuming it to be in the case, the learned trial court fell into error both in charging as requested by counsel for the plaintiffs and refusing to charge as requested by counsel for the defendants. The court charged, in substance, that if the plaintiffs were mere clearance agents for Valentine, and had not bought the bonds from the defendants, but had paid for them under the mistaken belief that they had been bought by Spingarn, and if the position of the defendants had not been changed by the transaction, the plaintiffs were entitled to recover. The court also declined to charge that if the jury should find that the check in question was paid in the usual course of business, for a valuable consideration to the defendants, without fraud or collusion on the part of the defendants relative to the

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transaction, the verdict of the jury must be for the defendants. Both of these rulings were erroneous within the principles by which we think this case is controlled.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

Decision No. 1437.

BARRONE et al. v. MOSELEY BROS.

(Court of Appeals of Kentucky. October 4, 1911.)

139 S. W. 869.

CONTRACTS — RESTRAINT OF TRADE.

A contract for the sale of a business may impose a reasonable restraint of trade.

A contract imposing a partial restraint of trade must be incidental to another contract or sale, in which the convenante has an interest requiring protection.

A contract in restraint of trade will be sustained only when the restraint is no more extensive than is reasonably required to protect the covenantee's interest in the property sold, and when it does not interfere with the public's interest by creating a monopoly.

Plaintiff sold to defendant certain laundry machinery, which plaintiff had used in his business, in consideration of $1,600, and the contract further provided that plaintiff had abandoned the shirt, collar, and cuff laundry business, and confined its business to doing family laundry and special work in shirts, collars, and cuffs from hotels, and that such stipulations should bind plaintiff, so far as the city or territory adjacent thereto was concerned. Held, that the agreement to abandon the shirt and collar business in the city was merely ancillary to the contract for the sale of the laundry machinery, within the rule requiring a contract imposing a partial restraint of trade to be incidental to another contract.

Appeal from Circuit Court, Warren County.

Suit by Moseley Bros. against B. J. Barrone and others. From a decree for plaintiffs, defendants appeal. Affirmed.

See, also, 144 Ky. 294, 137 S. W. 1048.

Sims & Rodes and T. W. & R. C. P. Thomas, for appellants. Grider & Harlan and G. H. Herdman, for appellees.

MILLER, J. In May, 1908, and for some time prior thereto, the appellee B. J. ("Bert") Barrone was engaged in the laundry business in Bowling Green, as manager and owner of the Bowling Green Steam Laundy Company. On October 22, 1908, in consideration of $1,600 paid to it by appellees, Moseley Bros., the laundry company, by B. J. Barrone, its manager and owner, sold to Moseley Bros. the

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following described property, which it had been using in its laundry business, to wit: One bosom press; two cuff presses; one yoke press; one N. B. press; one W. P. tipper; one Skinner dampner; one C. and C. ironer; one C. and C. starcher; one Torrence steam dampner; one air pump; one No. 2 Hurricane dry room; one M. hot tube; and one Adams C. and C. dampner. The other material parts of the contract were as follows:

"It is further agreed that the first party, the Bowling Green Laundry Company, is to abandon the shirt, collar and cuff laundry business, it reserving the right, however, to do family washing, including shirts, and to laundry shirts, collars and cuffs when they shall be sent in with 'hotel specials.' It being the object of this contract to confine the Bowling Green Laundry Co. to do family laundry and to do special work from the hotels of shirts, collars and cuffs. The Bowling Green Steam Laundry Co. binds its lessee that it, or any successor to whom it shall sell, shall be bound by these stipulations so far as the city of Bowling Green, or the territory adjacent to the city of Bowling Green, is concerned. The above covenant runs with the property conveyed to (by) the Bowling Green Steam Laundry Co., and takes effect from the delivery of the property."

In May, 1909, the appellees, Moseley Bros., brought this suit against B. J. Barrone and the Bowling Green Steam Laundry Company, to recover damages for an alleged breach of the contract, and for an injunction against the continued violation thereof. As defenses to the action, the appellants insisted (1) that the contract unreasonably restrained trade, and is unenforceable; and (2) that if it be conceded that the contract is valid, it has not, as a matter of fact, been violated.

That there may be a reasonable restraint of trade, is no longer an open question. Sutton v. Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. Law Rep. 453, 9 Am. St. Rep. 274; Louisville Board of Fire Underwriters v. Johnson, 133 Ky. 197, 119 S. W. 153, 24 L. R. A. (N. S.) 153. And, in applying the rule, appellants concede that covenants in partial restraint of trade are now generally upheld as valid, when made by the seller of a business not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner not to compete with the firm; by a partner not to do anything to hinder the business of the partnership; by an assistant or agent not to compete with his master or employer after the expiration of his term of service; by the buyer of property not to use it in competition with the business retained by the seller; or by a lessor of property not to be used in competition with the business of the lessee. It is, however, a very general rule that any contract of this character must be an incident to and in support of another contract or sale, in which the covenantee has an interest which is in need of protection.

As was said by this court in Clemons v. Meadows, 123 Ky. 181, 94 S. W. 14, 29 Ky. Law Rep. 620, 6 L. R. A. (N. S.) 847, 124 Am. St. Rep. 339: "Such contracts are intended to secure to the purchaser the good will of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint to be valid must [not] be more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business which he has purchased. In this

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class of cases the court recognizes that the vendor has received an equivalent for his agreement to partially abstain from business at the place where his business was formerly conducted. In such cases the agreement does not contemplate that the business or trade purchased shall be discontinued, and thus perhaps throw out of employment those whose services were necessary to carry on the business; but, on the contrary, it is contemplated that the business will be carried on, and that the public will continue to receive benefits which may accrue from the conduct of the business. It results that the agreement does not have the effect of depriving the public of any benefits which it has enjoyed from the conduct of the business, or pursuit of the trade which has been transferred to another. Such contracts do not have the effect of destroying the competition which existed, by reason of which the public enjoyed benefits."

In other words, a contract in restraint of trade will be enforced only when the restraint is no more extensive than is reasonably required to protect the interest of the party in whose favor it is given, and is not so large as to interfere with the interests of the public.

It is, however, a very general rule that all contracts of this character must be incident to and in support of another contract or sale, in which the covenantor has an interest which is in need of protection. In other words, no conventional restraint of trade will be enforced, unless the covenant embodying it is merely ancillary to the main purpose of a lawful trade, and is necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

Appellants insist, however, that a contract the sole object of which is to restrain competition is void as an unlawful restraint of trade, and that we now have such a contract before us. In support of that argument it is pointed out that the contract in this case binds the laundry company to "abandon the shirt, collar, and cuff laundry business;" that the contract, in effect, provides for a mere payment of money to appellants to abstain from business; and that that provision is not ancillary to a major contract, which needs protection, under the rule above laid down. If these facts were as contended for by appellants, the legal rule insisted upon by them would apply.

In Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125, a contract by an owner of an ice machine to discontinue the manufacture of ice in a certain town for the term of five years, when made without any sale of his business, and in consideration of money payments by the owner of the only other ice plant in the place, in which there was a demand for ice sufficient to consume and render marketable the output of both factories, was held void as against public policy, because it operated as a restraint of trade, and the creation of a monopoly in the supplying of ice within the town. There was no sale of the business in that case; neither was there any right to be protected, nor any consideration for the contract. Instead of being a contract ancillary to another contract of higher dignity, it was a bald agreement to pay a man to quit business, which is condemned by public policy.

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And in Clark v. Needham, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559, where a firm leased all of its machinery used in the manufacture of chaplets or anchors, with an agreement that it would not within five years manufacture or sell any chaplets or anchors, with some slight exceptions, and upon the execution of which lease the lessee leased back the machinery to the first lessor, with permission to use it for any other purpose than the one prohibited, the contract was held to be an illegal restraint of trade. The effect of the lease was to pay the party to quit business without a sale of his business to the other contracting party.

And in Webb Press Co. v. Bierce, 116 La. 905, 41 South. 203, a contract by which one had contemplated engaging in a lawful business in a certain place agreed, for a pecuniary consideration, with one with whom he had no previous relations, and who also contemplated engaging in the same business at the same place, to abandon his plan, was held void for the same reason. Chaplin v. Brown Bros., 83 Iowa 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297, is to the same effect.

If the contract is made for the protection of a private right created by the contract, and is reasonable in its provisions and scope, the court will uphold it; but if its direct purpose is to restrain trade, or if it results in a combination to create a monopoly, it will be condemned as illegal. This distinction is clearly recognized in the cases, and, in our opinion, it is a sound distinction. Anderson v. Jett, 89 Ky. 375, 12 S. W. 670, 11 Ky. Law Rep. 570, 6 L. R. A. 390; Merchants' Ice & Cold Storage Co. v. Rohrman, 138 Ky. 530, 128 S. W. 599, 30 L. R. A. (N. S.) 973, 137 Am. St. Rep. 39.

But the facts of the case at bar do not bring this contract within the distinction above laid down. It is true that the contract, in words, requires the appellants to abandon a certain line of laundry business; but when the contract, as a whole, is read, it is reasonably plain that the appellants sold this business to the appellees for $1,600, a valuable consideration, and that the agreement to abandon that business in the city of Bowling Green and the territory adjacent thereto was merely ancillary to the principal contract of sale. And that being true, the case falls within the general rule as above announced, and must be upheld. In so holding, we think the circuit judge was right.

2. The general outline of the facts which constituted the alleged breach of the contract is found in the opinion of this court, when the case was here at the last term upon a rule to punish the appellants for contempt for violating the order of injunction granted by the circuit judge, which may be found in 144 Ky. 294, 137 S. W. 1048. It is unnecessary to repeat that recital. We deem it sufficient to say that the proof fully sustains the finding of the chancellor that the Bowling Green Steam Laundry Company was organized for the purpose of evading the contract sued on herein, and that the contract has been otherwise violated.

The actions of "Bert" Barrone in continuing to buy machinery for his laundry up to almost the very day of the foreclosure and sale thereof by his brother, Joe Barrone, and "Bert" Barrone's attempt to get released from the contract shortly after he had made it, when taken in consideration with his assertion that he would defeat it, if

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necessary, by taking the bankrupt law, all go to show that the finding of fact by the chancellor was correct. Furthermore, there has been no change in the business, and "Bert" Barrone is in reality as much the manager and owner of the new business as he was the manager and owner of the old business, before the sale was made to the appellees.

In conclusion, it is sufficient to say that the allegations of fact made by Moseley Bros., that the appellants were doing work of the kind prohibited by the contract, have been fully sustained by the proof; and in giving judgment for $225 damages, and granting the injunction to prevent a further infraction of the contract, the chancellor was entirely within the law and the proof in the record.

Wherefore the judgment is affirmed, with damages.

Decision No. 1438.

TOOLE v. DANIEL.

(Court of Appeals of Georgia. September 28, 1911.)

72 S. E. 270.

SALES — FAILURE OF CONSIDERATION.

Where, in a defense to a suit on promissory notes, the defendant pleads that there has been a total failure of consideration, because the notes were given for a machine which, by reason of defects, was wholly worthless, and the defendant has testified that it was worthless because, at the time the suit was filed, the machine was so out of fix that it could not be operated, it is proper for the court to admit testimony tending to show that the machine had been repaired, and had been successfully used and operated, since the suit was filed. The fact that a machine may not be capable of operation without repair does not necessarily render the machine totally worthless, and the fact that it did successfully operate when the repairs were made, irrespective of the time when they were made, tends to show that the machine was not in fact without some value.

Where a defendant, upon being sued upon a promissory note, pleads that it was given for the purchase price of certain personal property, as to which there was a failure of consideration without showing that he had offered "to restore the plaintiff for the court to charge the jury that the defendant could not successfully assert failure of consideration without showing that he had offered "to restore the plaintiff to his former status within a reasonable time" from the moment he discovered the defects.

(Syllabus by the Court.)

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by J. B. Daniel against J. E. Toole. Judgment for plaintiff, and defendant brings error. Reversed.

T. S. Hawes, for plaintiff in error. John R. Wilson, for defendant in error.

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POWELL, J. Upon the original consideration of this case the court affirmed the judgment, announcing its decision by syllabus only, the first paragraph of which was identical with what is contained in the first paragraph of the syllabus above. Additionally, it was held that, while there was an error in the charge of the court, it was not material. The plaintiff in error filed a motion for a rehearing. After considering the points presented therein, the court granted the rehearing, and what is now about to be said is explanatory of our reasons for withdrawing the former judgment and substituting the judgment of reversal.

The defendant had pleaded total failure of consideration, and this, of course, includes the defense of partial failure. The evidence failed to establish the plea in toto (for the machine for which the note was given was, notwithstanding its alleged deficiencies, plainly of some value), but it was shown that there had been a partial failure. In one portion of the charge the court instructed the jury that "where a party sets up, as a defense to an unconditional contract in writing, that the consideration totally fails, it is incumbent on the defendant, the moment he discovers the defects, to restore the plaintiff to his former status in a reasonable time." This, of course, was erroneous. The duty of restoring the status applies where the defendant sets up rescission for fraud or breach of warranty, and not where the defense is based on failure of consideration. We did not overlook this in the original decision of the case, but we were then of the opinion that under the peculiar facts of the case the error resulted in no injury. We reached this conclusion upon the following line of reasoning: The court (though without withdrawing or in any wise retracting the incorrect instruction) did at the very conclusion of the charge take up the matter again and correctly instructed the jury. There was some evidence that the defendant had offered to restore promptly. The verdict was for less than the amount due on the notes and claimed in the suit. We concluded that the jury had allowed an abatement of the purchase price because of the partial failure of consideration.

The motion for rehearing points out that the abatement allowed by the jury was not necessarily a deduction because of any failure of consideration, but might have been made because by another plea the defendant had claimed credit for certain payments. After carefully considering the arguments and calculations submitted on the rehearing, we are not at all sure that our former conclusion was not correct. However, such a state of doubt has been created in our minds that we think that the safest thing for us to do is to grant a new trial. The charge complained of is manifestly erroneous, and prima facie prejudicial. The doctrine of no reversal for harmless error should never be applied so as to prevent a new trial, unless the court is reasonably satisfied that the error was in fact harmless.

Judgment reversed.

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Decision No. 1439.

WESTERN UNION TELEGRAPH CO. v. BICKERSTAFF.

(Supreme Court of Arkansas. June 19, 1911.)

138 S. W. 997.

TELEGRAPHS AND TELEPHONES — NEGLIGENCE.

Where a telegraph company receives a message for transmission, it must, if the message shows necessity for speedy delivery, send it promptly, but the telegraph company does not insure speedy transmission, and is only bound to exercise ordinary care and diligence in the transmission of messages, and is not responible for delays due to causes over which it has no control, or which it could not have remedied in due time by the exercise of ordinary diligence.

In an action against a telegraph company for delay in transmission of a message, where there was evidence tending to show that the wires had been torn down by a railroad, and that the telegraph company had knowledge of this fact before accepting the message, but did not repair the wires until twenty-four hours after notice of the wire trouble, it was proper to submit to the jury an instruction upon the liability of the telegraph company for negligent delivery.

A telegraph company which failed to inform the sender of a message that it could not be speedily forwarded, owing to defects in the line, is liable in damages for delay of the message.

In an action founded simply upon negligence, whether the injury was the natural and probable result of the negligence complained of is ordinarily a question of fact for the jury.

In an action against a telegraph company for delay in transmission of a message sent to apprise the plaintiff of his wife's desperate illness, evidence held to warrant the jury in finding that defendant'e failure to inform the sender of its inability to promptly transmit the message was the proximate cause of plaintiff's failure to reach his wife before her death.

Where a husband took his wife to a hospital about seventy-five miles from his home, and left her there to return to his business, knowing that the wife was desperately ill, though the doctor told him that she had a chance to recover, an award of $2,000 damages against the telegraph company for its failure to deliver a message in time for the husband to reach his wife before her death is excessive, and will be reduced to $1,000.

Appeal from Circuit Court, Desha County; Antonio B. Grace, Judge.

Action by William L. Bickerstaff against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Geo. H. Fearon, N. B. Scott, and Rose, Hemingway, Cantrell & Laughborough, for appellant. X. O. Pindall, for appellee.

FRAUENTHAL, J. This was an action to recover damages for mental anguish which appellee alleged he sustained by reason of the negligence of appellant in the transmission of a telegram to him announcing the grave illness of his wife. The appellee resided at Wat-

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son, Ark., which is about seventy-two miles distant from the city of Helena, between which places there was railroad and telegraph connection. About one week prior to October 19, 1910, appellee took his wife to Helena for medical treatment, and placed her in a hospital under the care of Dr. Rightor. He then left for his home, requesting the physician to telegraph him if she got worse; and he also told him that he could reach him by telephone, but that telegraphing was preferable, and this the physician agreed to do. On October 19, 1910, at 7.20 p. m., Dr. Rightor delivered to the appellant at its office at Helena, for immediate transmission, a telegram addressed to appellee at Watson, reading substantially as follows: "Mrs. Bickerstaff not doing well at all; you had better come up to-morrow" — and paid for same. It appears from the testimony introduced on behalf of the appellant that at the time this message was received its wires to Watson were down, and on that account it could not be properly transmitted. The testimony tended to prove that the wires were down and out of order at 1.55 p. m. of October 19th, and continued in that condition until about 11 o'clock a. m. of October 20th, when they were repaired and and the message was then sent from Helena at 11.20 a. m. of that day, and was received by the operator at Watson before the noon hour. The only regular trains running from Watson to Helena were a passenger train, which left Watson at 7.30 a. m. and arrived at Helena at 10.55 a. m. of the same day, and a local freight which left Watson at 8.30 a. m. and arrived at Helena at 5 a. m. The appellee had left his home on October 19th and gone a few miles distant, and remained overnight, but he left instructions with an employee at his home to send him any message that might come to him immediately upon its receipt. He returned on October 20, 1910, about 5 o'clock p. m., when he received the telegram, and catching a freight train passing about 9 o'clock that night, he proceeded to Helena, where he arrived on the early morning of October 21, 1910. His wife died about midnight of October 20, 1910.

There was a sharp conflict in the testimony as to whether or not the operator at Helena informed the sender of the telegram upon its receipt that the wires were down, and on that account it could not be promptly transmitted. We think, however, that there was some testimony which sustained the finding of the jury that this was not done. The testimony on the part of the appellee tended further to prove that there was telephone connection between Helena and Medford, which is about ten miles distant from Watson, and that telephone messages were sent to Watson from Helena by way of Medford; that a telephone message would be sent, according to custom, from Medford by private wire to Red Fork, which was a few miles from Watson, and would be sent from this latter place to Watson by messenger. Upon a trial of the case the jury returned a verdict in favor of appellee for $2,000 damages, and from the judgment rendered thereon this appeal is prosecuted.

The court instructed the jury that there were two acts of negligence charged against the appellant, upon which its liability was predicated: One, that the appelant negligently failed to promptly transmit and deliver the above telegram, and the other that it negligently failed to inform the sender upon its receipt that the wires were down, and that it could not be promptly sent on that account.

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Relative to the first act of negligence, the court instructed the jury, in substance, that the appellant as a telegraph company was not an insurer of the prompt transmission and delivery of messages entrusted to its care, but was bound to use reasonable care and diligence to effect such transmission and delivery. If the wires connecting Helena and Watson were down and not in working order at the time the message was received at Helena, and continued in that condition until after the train for Helena had left Watson, and if this condition of the wires was not due to any negligence upon the part of the defendant, and by the use of reasonable care and diligence the defendant could not repair said wires and put them in condition for use in time to transmit and deliver the message before said train had left Watson on the morning of October 20th, then the failure to transmit the message was not an act of negligence making defendant liable for damages therefor; otherwise, it was.

It is urged that there was no evidence upon which to base this instruction. When a telegraph company receives a message for transmission, it then becomes its duty to send it promptly, where the message on its face shows the necessity for prompt action. But the telegraph company does not insure the prompt transmission of any message. The extent of the obligation which it assumes, and the duty imposed upon it, is only to exercise ordinary care and diligence, and it is only liable for a failure to transmit as promptly as is reasonably practicable under all the existing circumstances. It is not responsible for delays due to causes over which it has no control, and against which it could not guard by the exercise of ordinary care, foresight, and diligence. But it will not be excused when the cause of the delay was due to its own negligence. This negligence may arise either where the trouble was caused originally by it, or where it could have been repaired in due time by the exercise of ordinary diligence. In other words, the law imposes upon the telegraph company the duty to exercise ordinary care and diligence, both in preventing any wire trouble and in repairing same promptly after it occurs. Where the telegraph company relies upon some trouble with its wires as an excuse for not promptly transmitting a message, it devolves upon the company to show that it was not due to any fault of its own. Tinslel v. W. U. Tel. Co., 72 S. C. 350, 51 S. E. 913; W. U. Tel. Co. v. McGown, 42 Tex. Civ. App. 565, 93 S. W. 710; W. U. Tel. Co. v. Scircle, 103 Ind. 227, 2 N. W. 604.

The testimony in the case at bar tends to prove that the wires were torn down at a point where they crossed the Illinois Central railroad tracks in Helena at the levee by a machine called a "clam shell," which was loading dirt, and that this wire trouble was learned by the appellant at or before 1.55 p. m. October 19, 1910, and that the wires were not repaired until 11 o'clock a. m. of the following day. Upon an examination of the testimony we are of the opinion that there was evidence from which the jury were warranted in finding that the appellant failed to show that it had exercised ordinary diligence in repairing these wires after the discovery of trouble with the wires, and also that if such ordinary care and diligence had been exercised the exact trouble could have been located and the wires could have been repaired, and the message transmitted in time for it to have reached

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the appellant, so that he could have left Watson at 7.30 a. m. on the 20th of October, and reached the bedside of his wife prior to her death.

As to the second act of negligence attributed to appellant, the court instructed the jury, in substance, that the appellee must prove that at the time of receiving the message the appellant's operator did not notify the sender of the fact that the lines were not working to Watson, and that there would be a delay in sending the message to plaintiff by reason thereof; also, that there were other means of communication between Helena and Watson by which the message could have been sent, and that it would probably have been received by appellee in time for him to have taken passage on the train leaving Watson on the morning of October 20th, and have reached the bedside of his wife prior to her death; and that the sender could and would have used such other means of sending the message if he had been so notified by the operator. It was the duty of appellant's operator, when he received the mesage for immediate transmission, to have informed Dr. Rightor that it could not be sent promptly because of the wire trouble. By giving him this information it would have afforded him an opportunity to have sent the mesage by other means. A telegraph company cannot rely upon the defense that it could not transmit a message an account of trouble with its wires, even though caused through no fault of its own, if the existence of the trouble was known to it when it accepted the message, and it failed to inform the sender of its inability to transmit it promptly on that account. In the case of Western Union Tel. Co. v. Harris, 91 Ark. 602, 121 S. W. 1051, 24 L. R. A. (N. S.) 1283, this court approved the following rule in regard to this question: "If a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means." In failing, therefore, to inform Dr. Rightor at the time the message was received by it for transmission that it could not be promptly sent because the wires were down, the appellant was guilty of negligence rendering it liable for the damages caused thereby.

But it is earnestly urged that the damages claimed are not the proximate result of the failure to give this information. This contention is based upon the ground that the probabilities that, upon receiving such information, the sender would have used other means for sending the message, and could by the use of such other means have sent same to appellant in time for him to have reached his wife before her death were too many and too remote upon which to base a recovery. In an action founded simply upon negligence, the injury must be the natural and probable result of the wrongful act complained of; but this is ordinarily a question of fact to be determined by the jury, and especially is this the case where the facts are susceptible of various inferences deducible therefrom.

Thus it has been held that a failure to complete a trade on account of the failure to hear from a partner in reply to a telegram sent for advice properly submitted to the jury the question of proximate cause of the damages arising from the failure to deliver such message. Wallingford v. Telegraph Co., 60 S. C. 201, 38 S. E. 443, 629. It has been frequently held that a jury might reasonably infer that an answer

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would be made to a telegram notifying the addressee of the death of a near relative, and also that the addressee would act thereon. W. U. Tel. Co. v. Caldwell, 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 748; W. U. Tel. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; W. U. Tel. Co. v. Morris, 83 Fed. 992, 28 C. C. A. 56; 27 Am. & Eng. Encyc. of Law 1035; 37 Cyc. 1746. In the case of W. U. Tel. Co. v. Webb, 135 S. W. 366, this court said: "It cannot be said as a matter of law that had this negligence not occurred the addressee of the telegram would not have received it in time to have delayed the burial until the arrival of the appellee because he did not send to Pioneer for the message. . . . The jury might have found under the evidence detailed above that if the operator had made inquiry, had he received the message on the morning of the 5th, he would have found at Pioneer some resident of Floyd who would have carried the message to Jessee Webb at Floyd, who would have arrived in time to have attended the burial of his brother." In the case at bar we are of the opinion that from the facts and circumstances adduced in evidence the jury could reasonably have inferred, and were warranted in finding, that, if the operator had informed Dr. Rightor that the message could not be promptly sent because the wires were down, he would have used the telephone to have sent the message, and that it could and probably would have been delivered to appellee in time for him to have reached the bedside of his wife before her death. Under these circumstances, the proximate cause of the damage sustained by appellee by reason of his failure to reach his wife before her death was the negligence of the appellant in failing to give the above information to Dr. Rightor.

It is insisted by counsel for appellant that the damages returned in this case are excessive. It is well settled that the damages which are returnable for mental anguish must result from the suffering caused proximately by the negligence complained of. In this case the suffering of appellee resulting solely from the failure to reach his wife before her death. There can be no recovery for any mental anguish suffered by him resulting from the death of his wife. That would have inevitably occurred, even if he had reached her bedside before her death. In the case at bar, the appllee took his wife, who was dangerously ill, to the hospital for treatment about one week before her death. He was then told by the attending physician that her condition was grave, although there was a chance of recovery. By remaining at Helena he could have seen his wife every day. He did not, however, remain at that city, but went to his home, which was seventy-two miles distant, to attend to business matters. While his business affairs were no doubt pressing and fully justified his leaving his wife in the care of those to whom he had entrusted her, yet it appears from the testimony that he did allow his business affairs to overcome his desire to be with and see his wife every day. In his complaint he laid his damages at $2,000, and recovered the full amount sued for. It is always difficult to measure in money a sentiment or the suffering of an anguished mind; but in cases of this kind the courts are called upon to do this, and it will not do to say that because these matters cannot be definitely estimated any sum without limit may be assessed as a measurement of such damage. In the case of W. U. Tel.

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Co. v. Weninski, 84 Ark. 457, 106 S. W. 486, this court said: "The element of mental anguish allowed by the statute in the assessment of damages for nondelivery of a telegram is so indeterminate in its nature that it must be left to some extent to the trial jury, but there is a limit to the power and discretion of the jury in this respect, and it becomes our duty to set aside an assessment which is palpably excessive." In the case of W. U. Tel. Co. v. Blackmer, 82 Ark. 526, 102 S. W. 366, a daughter recovered $1,000 from the telegraph company for the failure to reach her mother's bedside until after her death on account of its negligence in transmitting the message informing her of her mother's serious illness. In that case the court said: "No safe and satisfactory rule can be laid down for the assessment of damages in cases like this, but each particular case must be decided upon its own merits. In many cases similar to this courts have held verdicts for damages not exceeding $1,000 were not excessive." See, also, W. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; W. U. Tel. Co. v. Bowles, (Tex. Civ. App.) 76 S. W. 456.

Ordinarily the amount of damages growing out of mental anguish is left to the determination of the jury. Yet it is also the duty of the court to see that these damages are sustained by the facts and circumstances adduced in evidence in the case, and, where the amount returned by the jury is execssive, to review its assssment. Under the facts and circumstances of this case, we are of the opinion that $1,000 would be a full compensation for the damages sustained by the appellee.

The judgment will therefore be modified by reducing the amount of damages to $1,000, and, as thus modified, it will be affirmed.

Decision No. 1440

In re ROHRER.

(District Court, S. D. Ohio, W. D. January 26, 1911.)

186 Fed. 997.

WAREHOUSEMEN — PROPERTY — PLEDGES.

Pledges of so-called warehouse receipts against pledgor's whiskey stored in his own warehouse are invalid; there being nothing about the whiskey to indicate that any one else had any interest in it excepting the government's interest in payment of taxes.

Ownership of personalty is presumed from possession.

Possession must accompany a pledge, the pledgee having a qualified ownership, but there may be a symbolic or constructive delivery of possession if it is as effectual against the general owner as a delivery of the property.

A pledge of warehouse receipts symbolically passes possession to the pledgee.

A "warehouseman" is one who for business and for hire keeps and stores the goods of another.

In the Matter of David Rohrer, bankrupt. On question of validity of pledges. Orders directed.

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Kramer & Kramer, for Republican Dist. Co. and Mountain Dist. Co. H. L. Ferneding, John Shea, and D. B. Van Pelt, for Geo. H. Goodman Co. Robertson & Buchwalter, for Sadler. E. H. & R. A. Kerr, for Detrick Dist. Co. W. H. Mackoy, for White. Walter A. Ryan, for Pearl Street Market Bank. Young & Young and Ben. L. Heidingsfeld, for Heidingsfeld. Jackson W. Sparrow, for Burckhardt estate. Ferdinand Jelke, Jr., for Hofer. Rowe, Shuey, Matthews & James, for Stiver and others. Cobb, Howard & Bailey, for Edwards. Dale & Kusworm, for bankrupt. Healy, Ferris & McAvoy and James E. Robinson, for petitioners. Gilbert N. Bettman, for cross-petitioner. R. M. Ochiltree, for Merchants' Nat. Bank. Thomas B. Paxton, Jr., for C. Sandheger Co. A. J. Ullman, for Beech Hill Dist. Co.

HOLLISTER, District Judge. David Rohrer had a distillery and distillery warehouse in connection therewith in Montgomery county, Ohio. In the warehouse were stored 9,849 barrels of whiskey made in the distilley. During a number of years prior to the time he was adjudged a bankrupt he issued so-called warehouse receipts against his own whiskey in his own warehouse as security to persons who had loaned him many thousands of dollars in the aggregate. In some instances the same whiskey was described in different receipts issued to different persons. In one instance six different persons had receipts describing the same whiskey. He also sold some of the whiskey to innocent purchasers.

It is claimed by the trustees in bankruptcy and by the purchasers that the pledges were invalid, in that there was no delivery of possession, actual or constructive. The sole question involved in the present submission goes to the validity of the pledges. It will serve no useful purpose to enter into a lengthy discussion of the many decisions cited by counsel bearing upon this question; but a brief reference to some of them and the principles underlying the case may be sufficient.

It is clear that Rohrer's possession of this whiskey was complete as against everybody except the government of the United States, which, through its officers, acted merely as guardian or watchman, to the end that the whiskey warehoused by the distiller himself should not escape the payment of the tax on distilled spirits. The pledgees build their case on the language of Judge Acheson, in McCullough v. Large, (C. C.) 20 Fed. 309, in whose opinion Mr. Justice Bradley, sitting with him on the circuit, concurred. The question was whether a sheriff acting under process issued by a State court could seize the whiskey of a distiller in his own distillery warehouse under a writ of execution. The language is:

"The whiskey in question was virtually in the possession of the United States — held for internal revenue tax — and the sheriff could not rightfully disturb that possession."

This case was decided in 1884, and in it no reference was made to United States v. 36 Barrels of High Wines, 7 Blatchf. 459, Fed. Cas. No. 16,468, decided in 1870 by the circuit judge in the Northern District of New York. In that case the district judge in a proceeding for condemnation for certain barrels of high wines and grape brandy which had been fraudulently removed from a distillery warehouse without the payment of the tax charged the jury that property in such

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a warehouse cannot be considered in the possession or custody or within the control of the distiller. To this charge the attorney for the United States excepted. The Circuit Court reversed the judgment; Judge Woodruff saying among other things:

"The warehouse in this case was a part of the distilley premises, in the proprietorship of the claimants and the spirits in question were their property. The act nowhere in terms provides that the government inspector shall have any possession, custody, or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is giving to the inspector, through his participation in the custody of the warehouse, and by the discharge of his duty to keep the same locked when not personally present, a means of guarding against the illegal removal of spirits, but invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition, a custody of the spirits themselves. In point of law the owner of the spirits, and the owner of the warehouse wherein they are stored, is in possession of the spirits; and I have no hesitation in saying that he could maintain any action known to the law adapted to redress an illegal interference with his possession."

And it is further said with much else that is pertinent:

"So, here, in my judgment, the owner of both warehouse and spirits has possession and custody and control within the meaning of the act in question, even though, for the purpose of guardianship over the rights and interests of the government in the tax due thereon, the inspector be deemed to have a joint custody with him."

In United States v. Witten, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81, the action was on a bond given by Witten as principal to the United States. The condition was that the principal should pay or cause to be paid the taxes due on certain distilled spirits in his warehouse before the spirits should be removed and within three years from the date they were entered for dposit in the distillery warehouse. It was alleged that at the date of the bond Witten had on deposit in his distillery warehouse certain distilled spirits, and had failed to pay within three years from the date of entry the taxes due. The defendants were permitted to offer evidence tending to show that the locks on the doors of the warehouse, placed there by revenue officers, were not such as required by law, and were insufficient and insecure, and that the warehouse was broken open and the spirits stolen. The court refused to instruct the jury that, even if these facts were proved, yet the government was entitled to recovery. The Supreme Court held that these facts afforded no defense; Mr. Justice Gray saying:

"Under the requirements of the internal revenue laws, the warehouse was provided by the owner of the distillery, at his own expense and on his premises, and although declared to be a bonded warehouse of the United States, and required to be under the direction and control of a government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the

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tax at once. The government assumed no responsibility to him for their safekeeping. If he was not satisfied with the security of the warehouse, he had only to take any measure consistent with the access and supervision of the revenue officers to make it more secure, or else to pay the tax and remove the spirits. The only duty which the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein was to the government, and not to the defendants."

In Van Schoonhoven v. Curley et al., 86 N. Y. 187, the Court of Appeals of New York were of opinion that under such circumstances as these the distiller was not a warehouseman in the usual sense, but, as they say, "from necessity and force of law" only. At best, then, the government and the distiller have the joint custody of the warehouse, and so the statute says. Rev. Stat., § 3271 (U. S. Comp. Stat. 1901, p. 2122).

The possession of personal property presumes ownership. The ownership is general or qualified. Possession must accompany the pledge of personal property; the pledgee having a qualified ownership for the purposes of the pledge. There may be a symbolical or constructive delivery of possession to a pledgee, but that delivery must be as effectual against the general owner as the delivery of the property it represents. The property itself passes either actually or constructively out of any dominion or control of the owner, otherwise there is no pledge. Warehouse receipts symbolically pass possession from the general to the qualified owner, the pledgee, because the possession of the actual property has so far passed out of the hands of the general owner that acts of dominion exercised by him are no longer possible. When the pledgees took these receipts, they knew that the owner could satisfy such control as the government had jointly with him by paying the tax. They knew that such control as the government had might be raised at any moment, and that the owner would then be under no restraint whatever, and could roll the barrels out of the warehouse without let or hindrance from anybody. This would not be possible when goods are in a warehouse in the ordinary sense. A warehouseman is a third person who for business and for hire keeps and stores the goods of another. Black, Law Dict. He is a person who receives goods and merchandise to be stored in his warehouse for hire. Bouvier's Law Dict. and other authorities cited in Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; Bucher v. Commonwealth, 103 Pa. 528; Bank v. Shearer, 225 Pa. 470, 74 Atl. 351; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24. The owner stores his goods there and parts with possession. By contract with him the warehouseman has actual possession and the owner symbolical possession. The owner passes his symbolical possession on the pledge of the receipt. This is good because the owner has no dominion over the goods themselves, and the pledgee succeeds to his right to get the actual goods by presenting the receipt to the warehouseman, who will not, without it, part with them. The owner, after pledging the receipt, cannot himself get the goods. A delivery of actual possession prevents fraud of the pledgor. The delivery of the symbol should be no less effective. If he warehouses his own goods

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and issued receipts against them, the door is open for the grossest frauds; this case being an example.

If whiskey is stored in a general bonded warehouse provided by section 51 of the Act of August 27, 1894, c. 349, 28 Stat. 564 (U. S. Comp. Stat. 1901, p. 2143), which puts it into the joint custody of the storekeeper and third person, the proprietor of the warehouse, the owner, would be out of possession, and such frauds would be impossible. In Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779, the reason is given for the necessity of the change of possession from the owner to the qualified owner, the pledgee. Mr. Justice Bradley says in that case:

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

In Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, the Circuit Court of Appeals for the Third Circuit after making the same quotation from Casey v. Cavaroc says:

"It is true that a symbolical or constructive delivery is recognized in favor of articles of great bulk or difficulty of handling; but the policy of the law is against the relaxation of the rule. Sholes v. Asphalt Co., 183 Pa. 528, 38 Atl. 1029. And even as to these there must be a surrender of dominion and a setting apart of the property, with such distinctive marks as will serve to indicate that, while in the apparent possession of the owner, it is not in fact his. Philadelphia Warehouse Co. v. Winchester, (C. C.) 156 Fed. 600. As is well said by Judge Bradford in that case, there must be enough to negative ostensible ownership, nothing of which is to be found here."

In Bank v. Millbourne Mills, supra, the second headnote is justified by what is said in the opinion. It reads:

"A man cannot make a warehouse of himself as to his own goods, and by issuing and pledging warehouse receipts make a valid transfer as against his creditors of property which remains in his possession and under his control, without anything to distinguish it from his other property, or to indicate that he is not the unqualified owner."

There is nothing about this whiskey to indicate that anybody but Rohrer had any interest in it whatever, except the government, and that interest was solely that the tax would be surely paid before the whiskey was actually removed. It is true each barrel of whiskey had a mark and number, and that these marks and numbers were carried into the receipts, but there was no way to tell by looking at the barrels that they belonged for any purpose to anybody but the owner, nor were they put into the charge of any one as agent for the pledgee, facts which clearly distinguish the case from In re Cincinnati Iron Store Co., 167 Fed. 486, 93 C. C. A. 122.

Under the laws of Ohio, a pledge of chattels good as against creditors, subsequent purchasers, and mortgagees in good faith must be filed in the manner prescribed, unless there is an immediate delivery followed by actual and continued possession of the things mortgaged. Section 4150, Rev. St. In Thorne v. First National Bank, 37 Ohio St. 254, the law is declared to be that:

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"An instrument in the form of a warehouse receipt, executed by a debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor."

This case is directly in point, and its authority is not in the least disturbed by the decision of the Supreme Court of Ohio in Hunt v. Bode et al., 66 Ohio St. 255, 64 N. E. 126. The pledgor there had not issued a receipt against his own goods in his own warehouse. He had no possession of the chattels except such as was evidenced by the receipt in question, the validity of which was not attacked. By delivering the receipt to the bank, he symbolically delivered the possession of the property. His equity in the property as represented by the receipt was valuable. This he pledged to Dieckmann, and notified the bank. After the bank's claim was satisfied, nobody but Dieckmann could get the balance. The pledgor's possession was gone. The bank had to pay itself and Dieckmann.

I have only referred to some of the most important cases among the very many cited by counsel. To my mind they show conclusively that the referee reached the proper conclusion as shown by the admirable opinion filed by him in the case. The referee did not follow th decision of the district judge in the Eastern District of Pennsylvania in Re Miller Pure Rye Distilling Co., (D. C.) 176 Fed. 606, in which the exact question was decided in favor of pledgees. Counsel for the pledgees rely upon that case as establishing every principle they contend for in this and commend to the court the reasoning of the learned judge in his opinion in that case as coinciding with the conclusions they had reached before that case was decided. It appears that the Circuit Court of Appeals for the Third Circuit has reversed that judgment. Mr. Thomas B. Paxton, Jr., one of the opposing counsel, has filed and submitted in this case an uncertified typewritten paper purporting to be a decision of that court, dated November 9, 1910; the opinion being written by Archbald, District Judge.

It is assumed that the decision is what it purports to be, and this court, being in entire agreement with it, cheerfully follows it. But, whether that decision was made or not, the reasons given in what purports to be the opinion, and upon the authorities cited for the invalidity of the pledges, are it seems to me unanswerable. Orders may be taken accordingly.

The relative rights of the trustees and purchasers, the relative rights of the pledgees and the trustees, as affectd by York v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and the status of those pledgees who filed their receipts as if chattel mortgages, were not argued orally or by brief by both sides in those controversies, and are therefore not now decided.

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Decision No. 1441.

AMALGAMATED SUGAR CO. v. UNITED STATES NAT. BANK OF PORTLAND, ORE.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1911.)

187 Fed. 746.

BANKS AND BANKING — CHECKS.

Defendant drew a check on its bank in O., and by indorsement made the check payable to its deposit bank in L., which thereafter became insolvent. The check was credited to defendant on the books of the L. bank and sent to plaintiff, the L. bank's correspondent for collection and credit. Plaintiff on receiving the check, payable by indorsement to the order of any bank or banker, in a letter advising that it was inclosed for collection and credit, credited the amount to the L. bank's general account, and thereafter paid drafts against the account and made remittances to the L. bank, so that its credit at the close of business on October 10th, when the L. bank closed its doors, was much less than the amount of the check which, on being presented to the drawee bank for payment, payment was refused because defendant had ordered payment stopped. Held, that plaintiff bank was a bona fide purchaser of the check for value, and not a mere subagent of the insolvent bank for collection and credit, and was therefore entitled to recover in the absence of proof that he purchased the check with actual knowledge of the deposit bank's insolvency or any infirmity connected therewith.

The rights of plaintiff bank as a bona fide purchaser being determined in accordance with the legal as disinguished from the equitable rights of the parties, it was entitled to recover the whole amount of the check, and was not subject to a deduction to the amount in its hands to the credit of the indorsing bank at the time of the latter's failure.

In Error to the Circuit Court of the United States for the District of Oregon.

Action by the United States National Bank of Portland, Ore., against the Amalgamated Sugar Company. Judgment for plaintiff (179 Fed. 718), and defendant brings error. Affirmed.

The defendant in this action drew a check on its banker for $4,000, which in due course of banking business was received by the plaintiff, properly indorsed, and without knowledge of any defect impairing its commercial value. When presented for payment, the bank upon which it was drawn refused to pay for the reason that the drawer had ordered payment stopped. Thereupon the plaintiff instituted this action, and a judgment was rendered in its favor for the amount of the check with interest and costs; and to test the validity of that judgment the defendant has brought the case to this court by a writ of error.

The undisputed facts of the case are as follows: The defendant is a corporation actively engaged in business at Ogden, in the State of Utah, and at La Grande, in the State of Oregon, and for convenience kept a bank account in each of said places, its La Grande banker, at the times of the transactions involved, being the Farmers & Traders' National Bank, which for convenience will be hereafter referred to in

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this opinion as the "insolvent bank." The plaintiff is a national banking association located at Portland, in the State of Oregon, and was at the times referred to the Portland correspondent of the insolvent bank. The check on which the action is founded was drawn by the defendant on its Ogden banker, and was by indorsement made payable to the order of the insolvent bank and delivered to it, and the amount thereof was at once credited to the defendant on its deposit account subject to check. Only a few checks against that account were subsequently paid, amounting in the aggregate to less than the balance in the defendant's favor immediately before it was augmented by the credit of $4,000 entered on account of said check. The deposit was made in accordance with the usual custom in that bank by accompanying the indorsed check with a depositor's memorandum slip on which there was printed the following specification of conditions: "Items listed hereon are taken at owner's risk until we have reduced to our own possession the funds received by us in settlement thereof, and credits or remittances made by us therefor are subject to revocation until we have received actual final payment. Mediums of collection employed are your agents, and we assume no responsibility for their neglect, default, or failure. In making this deposit, the depositor expressly assents to the foregoing conditions." The deposit was made October 6, 1908; the bank continued as a going concern until the close of the business day of Saturday, October 10th. On Monday, the 12th, it was not opened for business, and it was not until that day, or the day following, that the parties to this action were informed of its insolvent condition. October 8, 1908, the plaintiff received the check, made payable by indorsement to the order of any bank, or banker, inclosed in a letter from the insolvent bank, saying: "Inclosed find for collection and credit," which words we interpret to mean that the check was transmitted for collection and the amount when collected to be credited to the transmitter on its current account. The plaintiff according to its habitual practice immediately entered credit to the insolvent bank for the amount of the check on its current account, and thereafter paid drafts against that account and made remittances to the insolvent bank, so that its credit balance was reduced to the sum of $1,839.01 at the close of business October 10th and to $9.85 on October 12th, which by the return of remittances not received by the insolvent bank was increased to $376.37. The plaintiff sent the check to its correspondent at Salt Lake for collection, and it was presented for payment October 14th after the defendant had notified the drawee to stop payment.

Snow & McCamant (Geo. B. Guthrie, on the brief), for plaintiff in error. Chamberlain, Thomas & Kraemer (Lester W. Humphreys, on the brief), for defendant in error.

Before MORROW, Circuit Judge, and HANFORD and WOLVERTON, District Judges.

HANFORD, District Judge (after stating the facts as above). One or the other of the parties to this lawsuit must necessarily suffer a loss because of the insolvency of the first indorsee of the check, and the question as to which must bear the loss must be decided in accord-

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ance with their respective legal rights. The reasons are obvious and sufficient for holding that the insolvent bank did not acquire any proprietary right to the check which could be maintained against the defendant, if rights of a third party were not involved. The check, however, was negotiable paper, and the unrestricted indorsement thereof by the defendant, who was the drawer, payee, indorser, and real owner, warranted uninformed persons in receiving it, bona fide, as paper which the insolvent bank could rightfully dispose of.

This case is easily distinguishable from the cases cited by counsel for the plaintiff in error, of which Evansville Bank v. German American Bank, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259, is a sample. In that case a draft was transmitted for collection to the Fidelity National Bank of Cincinnati, a few days before the insolvency of that bank became known to its patrons. The letter in which it was transmitted was similar to the letter in which the defendant's check was transmitted to the plaintiff, but the indorsement on the draft was in the following words: "Pay Fidelity National Bank of Cincinnati, or order, for collection, for German American Nat'l Bank of Peoria, Ill's." That form of indorsement divested the draft of its negotiable quality, and the difference between that case and this one is as wide as the difference between negotiable and non-negotiable instruments. The plaintiff had a legal and moral right to buy the check, and it is the opinion of this court that it did buy the check, and that the purchase was fully consummated before any of its officers or agents were apprised of the insolvency of the first indorsee or of the defendant's ownership. If it had merely received the check, given credit for it by a book entry and passed it on to another bank for collection, without having given anything in exchange, the case would be different, but by reason of the plaintiff's relationship to the insolvent bank as its Portland correspondent and of their method of doing business with each other the plaintiff had a right to absorb and appropriate to its own use negotiable paper received from the insolvent bank in exchange for drafts paid and remittances made and debited to that bank in its current account, prior to notice of its insolvency, and, when the check was credited in that account, the amount of money which it represented was, in legal effect and actually, subtracted from the plaintiff's assets and added to the assets of the insolvent bank. Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Sd. 363.

The whole argument in behalf of the defendant seems to be grounded upon an idea that the letter of transmittal from the insolvent bank constituted the plaintiff a subagent and that, having received for collection and credit a check made payable to the defendant's order, the subagent could not become a bona fide purchaser, for the reason that the circumstances mentioned were suggestive of possible rights of the defendant which an agent should protect and sufficient to put an ordinarily prudent person on inquiry, and therefore sufficient to charge the subagent with actual knowledge of the facts which would have been discovered by diligence. That idea is opposed to principles of commercial law established by decisions of the Supreme Court. Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Smith v. Sac County,

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11 Wall. 139, 20 L. Ed. 102; Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645; Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84. One of the rules deducible from this list of cases is that, in an action by an indorsee upon a negotiable instrument vitiated by fraud in its inception or issued without consideration, the plaintiff, to prevail, must prove affirmatively that he paid value. That fact being established, he will be entitled to recover unless it is proved that he purchased with actual knowledge of the defective title, or in bad faith, implying guilty knowledge, or wilful ignorance. Circumstances which presumably would put a prudent buyer on inquiry are not enough, but to defeat an action by an indorsee of negotiable paper who obtained it in due course of business, before its maturity, and paid value for it, actual knowledge of facts sufficient to constitute a valid defense, if the action were prosecuted by the mala fide indorser, must be proved affirmatively. This rule in all of its rigor was applied by this court in the case of the First National Bank v. Moore, 148 Fed. 953, 78 C. C. A. 581. In this case the element of fraud on the part of the insolvent bank in wrongfully disposing of the check in a manner to increase its own assets without giving value in exchange must be held to be wholly irrelevant to the issue to be determined, viz., which one of two equally innocent parties shall bear the consequent loss. The parties before the court are equally innocent, for, if it be true that the plaintiff might have avoided the loss by an inquiry, it is also true that the defendant might have avoided the loss by making its indorement of the check in a form which would have made the fraudulent conversion of it before payment a legal impossibility.

The defendant insists that, in the event of the failure of its general defense, there should be a reduction of the plaintiff's demand equal in amount to the credit balance in favor of the insolvent bank in its account with the plaintiff. This contention is advanced upon a theory that a fraud was committed by the receipt and disposal of the check by an insolvent, that springing from that fraud a trust attached to that balance, and that as the beneficiary of that trust the defendant may, by right of subrogation, use said balance as a set-off. In answer to this contention, it is sufficient to repeat that the case must be determined in accordance with the legal rights of the parties. Equitable defenses cannot be admitted. It is the opinion of the court that the plaintiff acquired a clear, legal, proprietary right to the check and the right to compel payment in full, and that the defendant has not pleaded nor proved any counter demand against the plaintiff cognizable in an action at law.

Judgment affirmed.

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Decision No. 1442.

PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, Plff. in Error, v. DANA MALONE, Attorney-General of the Commonwealth of Massachusetts.

(Argued April 26, 1911. Decided May 29, 1911.)

31 Sup. Ct. Rep. 661.

CONSTITUTIONAL LAW — SAVINGS BANKS.

A savings bank, so far, at least, as its rights are involved in those of its depositors, may raise the objection that property is taken without due process of law by Mass. Laws 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

The property of a savings bank is not taken without due process of law by Mass. Laws 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

Savings banks are not unconstitutionally discriminated against by making applicable to them alone the provisions of Mass. Laws 1907, c. 340, that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

The obligation of the contract between a savings bank and its depositor is not unconstitutionally impaired by Mass. Laws 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

In Error to the Supreme Judicial Court of the State of Massachusetts to review a judgment which affirmed a judgment of the Probate Court in and for the county of Suffolk, in that State, requiring a savings bank to pay over unclaimed deposits to the treasurer and receiver-general. Affirmed.

See same case below, 201 Mass. 23 — L. R. A. (N. S.) —, 86 N. E. 912.

Statement by Mr. Justice LAMAR:

In 1907 the general court of the commonwealth of Massachusetts passed an act providing that deposits in savings banks which had remained inactive and unclaimed for thirty years, and where the claimant was unknown or the depositor could not be found, should be paid to the treasurer and receiver-general.

Under this statute, which is copied in the margin,* the attorney-

* Sec. 56. The probate court shall, upon the application of the attorney general, and after public notice, order and decree that all amonts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account, or withdrawn any part

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general on May 5, 1908, filed in the Probate Court of Suffolk county a petition, setting out the names and last known addresses of 226 persons who had deposit accounts ranging from $1 to $4,284 in the "Provident Institution for Savings in the Town of Boston." He alleged that for more than thirty years no part of the principal or interest had been withdrawn, no interest had been added upon any of the pass books, and no additional deposits had been made on any of the accounts; that no claimant for any of said deposits was known, and that the depositors could not be found. He thereupon prayed that the court would order the said sums of money, with the increases thereof, to be paid over to the treasurer and receiver-general of the commonwealth. A copy of the petition was served on the bank, and a citation, addressed to the depositors, was published once in each week for three successive weeks in two newspapers in Boston, requiring them each to show cause on July 16, 1908, why the prayer of the petition should not be granted.

The savings bank alone answered. It admitted the allegations of the petition. It averred, however, that when each deposit was made, an agreement was signed by which the by-laws of the bank, made in pursuance of the charter granted December 11, 1816, were assented to by the depositor. These by-laws provided that regular semi-annual dividends of four per cent. should be declared on all deposits of five dollars and over, and should be added to the principal; that no dividends should be paid on sums above $1,600; that no money could be withdrawn without the production of the pass book, and that by a vote of the trustees they might dissolve the institution at any time, and divide the whole property among the depositors, in proportion to their respective interests therein.

The bank contended that the act requiring deposits to be paid over to the receiver-general deprived persons of their property without due process of law, and also impaired the obligation of contracts. After hearing, the Probate Court directed the bank to pay over and transfer to the treasurer and receiver-general of the commonwealth the amounts deposited by the persons named in the petition. On appeal, that order was affirmed by the Supreme Judicial Court of Massachusetts. 201 Mass. 23, — L. R. A. (N. S.) —, 86 N. E. 912.

Messrs. John C. Gray, William Ropes Trask, and Roland Gray, for plaintiff in error. Messrs. Dana Malone and Fred T. Field, for defendant in error.

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thereof or the interest, or on whose pass books the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the pass book, and for which no claimant is known or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate of 3 per cent per annum from the time when it was paid to said treasurer to the time when it is paid over by him to such person.

Sec. 57. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of either of the two preceding sections . . . may establish the same by a petition to the superior court. . . .

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Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court:

The Massachusetts statute as to abandoned funds in savings banks only applies where the owner cannot be found. In the nature of the case, therefore, no depositor could except to the judgment of the Probate Court which directed the money to be turned over to the treasurer; and, it is claimed that, as the bank does not represent the depositors, it cannot be heard to raise the objection that their property has been taken without due process of law. New York ex rel. Hatch v. Reardon, 204 U. S. 160, 51 L. Ed. 422, 27 Sup. Ct. Rep. 188. This may be true, except in so far as its rights are involved in those of the depositor. Savings banks are maintained in the expectation that the deposits may, for years, remain uncalled for, to the mutual advantage of bank and customer. So that, if the statute had provided that the money should be paid over to the receiver-general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented from that arising under an act which deals with absence and nonaction so long continued as to suggest that the law of escheats or of lost property might be enforced. This, however, is not a statute of escheats, since it does not proceed on the theory that the depositor is dead, leaving no heirs. It does not purport to dispose of lost property, but deals with a deposit the owner of which, though known, cannot be found. The act is like those which provide for the appointment of custodians for the real and personal property of an absentee.

In this case, though the money is on deposit with a bank, which has faithfully kept its contract, yet the statute proceeds on the general principle that corporations may become involved, or may be dissolved; or that, after long lapses of time, changes may occur which would require some one to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appear to claim it; or, failing that, until it should be escheated to the State. The right and power so to legislate is undoubted. Cunnius v. Reading School Dist., 198 U. S. 458, 49 L. Ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121.

The statute here is reasonable in its terms, and is so framed as to work injustice to no one. It only applies to cases where no deposit has been made, no interest added on pass book, no check drawn against the account, for thirty years, and where no claimant is known, and the depositor cannot be found. Before the money can be turned over to the receiver-general proceedings must be instituted in the Probate Court, and, under the decision of the Supreme Court of the State, personal notice must be given to the bank, and citation and notice, usual in the Probate Court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer, to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right.

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It is true that the rate of interest paid by the State is not the same as that paid by the bank — as to sums under $1,600 it is less, and as to those over $1,600 it is more. But this is a matter with which the plaintiff in error is not concerned, and can arise only between the State and the claimant when he asserts a right to property long neglected and apparently abandoned.

But the bank insists that there has been no abandonment; that the money is in safe hands where it was originally left, under by-laws which contemplated that the deposit might remain in the bank without interest on sums over $1,600 until the corporation was dissolved. It contends that to deprive it of the benefit of such deposits is to take property without due process of law.

But while there was a possibility that the money might so remain, the bank had no right to require that it should be so left. Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown. On dissolution, the share of a depositor who could not be found would be paid over to his legal representative, who might be an administrator in case his death was established, or a guardian, in case of mental incapacity, or a trustee in bankruptcy in case of insolvency, or a representative appointed under statutes applicable to abandoned property. But it is not necessary to wait for the dissolution of the bank. If the facts warrant it, a legal representative can be appointed at any time, with all the rights incident to such appointment, including that of withdrawing the funds and holding them for the true owner when he shall establish his claim.

There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage-earners, moving from place eo place, there is special reasons for intervening to protect their interests in this class of property in banks as to which the State's supervisory power is constantly exercised.

The other questions as to payment without the production of the pass book, the rights and relations of the parties arising out of the charter and contract of deposit, present no federal question. The statute does not violate the Constitution of the United States. The judgment is affirmed.

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Decision No. 1443.

STATE OF NEW YORK NAT. BANK v. KENNEDY et al.
(Supreme Court, Appellate Division, Third Department. June 28, 1911.)

130 Supp. 412.

BILLS AND NOTES — TIME.

Under the Negotiable Instruments Law, which, by section 130, makes the presentment of a note necessary to charge the indorsers, and by section 134 requires the notes to be exhibited to the person from whom payment is demanded, a mere informal talk asking payment of a note, not accompanied with a presentment of it or intended as a formal presentment and demand, is not sufficient to put the note in dishonor.

Under Negotiable Instruments Law, § 138, requiring that where there are several persons primarily liable on a note, and no place of payment is specified, presentment shall be made to all of them, an informal demand on one of two joint makers is not a basis of charging indorsers.

In an action on a note, where its presentment in a reasonable time is in issue, evidence that it was the custom of banks to hold demand paper with an indorser for years, if the parties were good and the bank did not require the fund, is admissible.

Where parties interested in an estate had been impleaded in an action on a note made by the executors in an estate matter, to the making of which they had consented, they cannot on appeal from a judgment for the holder complain that, in considering the question of reasonable time for presentment, the holder treated the note as an obligation of the estate, instead of that of the executors individually.

Evidence in an action on a note as to whether it had been presented within a reasonable time held sufficient to sustain a verdict for plaintiff.

Appeal from Trial Term, Ulster County.

Action by the State of New York National Bank against Gilbert F. Kennedy and another, with whom were impleaded Anna M. Kennedy and another. From a judgment for plaintiff, the defendants impleaded appeal. Affirmed.

See also 138 App. Div. 932, 123 N. Y. Supp. 1142.

This is an appeal by the defendants Anna M. Kennedy and Adelaide G. Kennedy from a judgment of the Supreme Court entered in Ulster county October 21, 1910, upon the verdict of a jury and from an order denying their motion for a new trial upon the minutes. The action was to recover upon a promissory note made October 22, 1907, for $2,300 payable on demand, with interest, made by the "estate of David Kennedy by Gilbert F. Kennedy and Eliza B. Kennedy, executors." It was given for an indebtedness then due the bank, of which $1,200 was for a protested check made by the estate of David Kennedy on the Farmers' Loan & Trust Company of New York. The remainder was upon a protested draft made by David Kennedy's sons on Charles Kennedy in Utah.

Eliza B. Kennedy is the widow of Dr. David Kennedy, and she and her son Gilbert are trustees and executors under his will, and the

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other defendants are daughters of Dr. David Kennedy, and all the parties are beneficially interested in his estate. At the request of Gilbert Kennedy, the bank agreed to accept the note in suit for the indebtedness mentioned, and it was understood between him and the bank that the note was to be paid as soon as he could, although there was no definite time when he should take care of it, and about two months after the note was made the cashier of the bank called his attention to it and suggested that he pay the same, and afterwards again called his attention, telling him that he had not paid it as soon as he was to; and it wrote him letters asking payment of the note, asked payment over the telephone, asked payment from him while he was in the bank, and he replied to some of these requests or demands that they, the Kennedy family, were not then able to pay the note. On April 15, 1909, the note was formally presented for payment at the bank and protested for nonpayment, and this action followed. Gilbert Kennedy was a director of the bank. October 10th, before the giving of the note, the daughters and mother had joined with Gilbert in guaranteeing certain other notes to the bank amounting to $20,415.

This case was before the court upon the pleadings in 138 App. Div. 932, 123 N. Y. Supp. 1142, where an interlocutory judgment overruling a demurrer to the complaint for insufficiency was sustained. The complaint is in the usual form against makers and indorsers. The defendant there contended that the lapse of time was as a matter of law unreasonable, and that the complaint was therefore insufficient. The court considered the pleading sufficient, and that it was a question of fact to be determined upon the trial whether the presentment was made within a reasonable time or not.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, SEWELL, and BETTS, JJ.

Rounds, Hatch, Dillingham & Debevoise (Eugene Congleton and Ralph S. Rounds, of counsel), for appellants. William D. Brinnier (Gilbery D. B. Hasbrouck, of counsel), for respondent.

JOHN M. KELLOGG, J. The cashier, as a witness, stated that he had informally demanded payment of the note from Gilbert a dozen of times, but that they were not formal demands of the bank. The note apparently was not presented, and no request or demand was made on Mrs. Kennedy, who joined with Gilbert in making the note. The trial court instructed the jury, in substance, that a mere informal talk asking payment of a note and not accompanied with a presentment of it, or intended as a formal presentment and demand, was not sufficient to put the note in dishonor. I think this instruction was well within sections 130 and 134 of the Negotiable Instruments Law. Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656.

Unless a formal presentment and demand was made at the bank, an informal demand on Gilbert was not such a demand as the law contemplates as a basis for charging the indorser if the note is treated as not an obligation of the estate, for in the case of joint debtors the demand must be made upon both. Negotiable Instruments Law, § 138.

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If the obligation is not a note of the estate, it was clearly the note of Gilbert and his mother. These informal demands, however, were important circumstances bearing upon the question whether the note was actually presented for payment within a reasonable time.

It is urged that it was error to permit the plaintiff to prove that it was the custom of banks to hold for years demand paper with an indorser, if the parties were good and the bank did not require the funds.

The case was submitted to the jury upon the theory that the question for them to determine was whether the presentment was made within a reasonable time. This evidence cannot change the rule of law applicable to the case, but was submitted as a circumstance of some weight in judging the actions of the bank.

It is urged that this note was not the note of the estate, but the individual note of Gilbert and his mother. A part of the note was apparently for an estate matter, and Gilbert and his mother and the two sisters assented to the use of the name of the estate as a maker to the note, and they are not in a position, therefore, to complain, in considering the question of reasonable time, that the bank treated the note as an obligation of the estate. If it was an obligation of the estate, pressing the makers crowded the estate and was prejudicial to the interests of the indorsers as well as to the makers, all of whom wre interested in the estate.

The form of the note, the fact that the bank was informed that the family was not in a position to pay it, and that forbearance was requested by the person representing the estate are circumstances which the jury had the right to give some weight to in determining whether the bank had unreasonably delayed presenting the note for payment.

The relationship and intimate association of the parties to the note and all the facts and circumstances surrounding the situation were also proper elements for consideration.

Under all the circumstances, it was a pure question of fact, and we cannot say that the determination of the jury is against the evidence.

The judgment and order should therefore be affirmed, with costs. All concur.

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Decision No. 1444.

FIDELITY & DEPOSIT CO. OF MARYLAND v. COLBY et al.

(Supreme Court, Appellate Division, Fourth Department. December 6, 1911.)

132 N. Y. Supp. 20.

BANKS AND BANKING — DEPOSITORS.

A national bank bookkeeper induced defendants to deposit funds in the bank, and from time to time received money outside the bank to be deposited for them, but so manipulated accounts as to enable him to appropriate the money to his own use; checks against the deposits being charged against other depositors. On discovery of the bookkeeper's defalcations, his surety paid the bank the shortage and took an assignment of the bank's claim against defendants, arising through the overdraft resulting from charging their checks against their account. The National Bank Act (Rev. St. U. S., § 5190) requires a national bank to transact its business at the place specified in the organization certificate. Held that, as affecting defendants' liability to the surety, the bookkeeper must be deemed to have been defendants' agent, and not the bank's.

Appeal from Trial Term, Erie County.

Action by the Fidelity & Deposit Company of Maryland against Huron Colby and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before McLENNAN, P. J., and SPRING, WILLIAMS, KRUSE, and ROBSON, JJ.

Frederick Haller, for appellants.

Roland Crangle, for respondent.

SPRING, J. The defendants, who are copartners, kept an account with the Commercial Bank of Buffalo at the solicitation of one Johnson, an employee of the bank and a friend of the defendants. The business of the Commercial Bank was taken over by the Marine National Bank of Buffalo in the early part of 1903, and the defendants continued to make deposits and do business with that bank.

In the year 1903 Johnson, who was then a bookkeeper in the Marine National Bank, was in the habit of receiving checks or money, belonging to the firm, from one of the defendants at his boarding place, usually in the evening, and some of the money he appropriated and some he delivered to the receiving teller of the bank, and credit was given for the money received by the bank and the amount of the several checks. The defendants drew checks from time to time against their account in the bank, which were paid by it. Johnson had these checks to charge against the account of the defendants, but

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instead of doing so charged them to the accounts of other depositors, and retained the checks. In the early part of September the books of the bank showed that the defendants had overdrawn their account to the amount of $18.98, of which they were advised.

Johnson had manipulated several accounts in the bank, and his defalcations exceeded $5,000, including about $900 which he had stolen of the money given him by the defendants to deposit in the bank. An investigation disclosed these peculations, and he surrendered to the bank the checks of the defendants which he had charged to the accounts of other depositors, and they were, in November, 1903, charged to the account of the defendants, making an overdraft of nearly $900, which the defendants refused to pay. Johnson had furnished to the bank the surety bond of the plaintiff, and it paid to the bank the full amount of the shortage caused by Johnson, and obtained from the bank an assignment of its claim against the defendants by reason of the overdraft; and this action is to collect that sum.

The defendants claim that Johnson, in receiving their money, represented the bank, instead of acting in their behalf. I think the position is untenable. The inception of the account at the Commercial Bank was because of the desire of the defendants to accommodate and aid Johnson. When the account was running in the Marine National Bank, Johnson obtained a passbook for the defendants and generally returned it to one of them when money or checks were delivered for deposit, but Johnson did not then enter the credits in the passbook. The entries were made at the bank by Johnson, or by one of the tellers. When Johnson returned the passbook to the defendants, he had entered correctly all the credits to which the defendants were entitled, if everything had been properly delivered to the bank by him. The defendants must have known, from the course of business, that these entries were to be made at the bank, for Johnson brought the book each time from the bank with the entries made.

Money left at the bank by its depositors for deposit was delivered to the receiving teller. No part of this sum of $900, paid to Johnson by the defendants, was paid to the receiving teller, or came into the actual custody of the bank. There was no definite representation made by Johnson to the defendant that he was authorized to act as agent for the bank in receiving this money for it. The inference is rather to the contrary, for he was getting the money and checks primarily to help him in his standing with the bank. Nor is there any evidence that the Marine National Bank authorized him to receive these moneys as its agent. It was not within the compass of his duties to receive money even in the bank, much less from people on the street or at their homes. None of the officers of the bank knew anything about the course Johnson was pursuing, for the money stolen never came into its custody, and he never advised any of them that he was receiving money on behalf of the bank.

Section 5190 of the National Bank Act (U. S. Comp. St. 1901, p. 3486) is as follows:

"The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."

The authorities, so far as I have been able to find, support the proposition that where an employee of a bank receives money for

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deposit outside the bank, and it does not reach the bank, he is the agent of the person delivering him the money, and not of the bank. Manhattan Co. v. Lydig, 4 Johns. 377, 386, 4 Am. Dec. 280; Demarest, Treas., et al. v. Holdeman et al., 34 Ind. App. 685, 693, 73 N. E. 714; Armstrong v. Second Nat. Bank of Springfield, (D. C.) 38 Fed. 883. The stockholders of the bank provided a place for the transaction of its banking business, and the duties of its officers and employees were defined by it. Its banking business was not carried on outside of the bank. Nor is there any proof that any one was authorized to accept money elsewhere than at its usual place for doing business, and there was no assent to the acceptance of the money of the defendants at the boarding place on its behalf.

I think Johnson represented the defendants, and they relied upon his honesty, and their confidence in him, unfortunately, was misplaced. I think the judgment should be affirmed.

Judgment affirmed, with costs. All concur.

Decision No. 1445.

BOROUGH BANK OF BROOKLYN v. ROSENSWEIG et ux.

(Supreme Court, Appellate Division, Second Department. November 24, 1911.)

132 N. Y. Supp. 84.

BANKS AND BANKING.

Where defendant purchased a claim against a bank to which he was indebted, and the bank passed into the hands of a receiver, the assignment of the claim did not give defendant the right to have the same applied on his note to the bank pending the receivership; but the bank having resumed business, and the deposit having remained intact, defendant was then entitled to have the assigned deposit credited against his indebtedness, subject to the bank's right to deduct therefrom any debt owing to it by the assignor.

Where a bank depositor assigned his claim to defendant, who claimed the right to offset it against his indebtedness to the bank, which also claimed the right to offset an alleged indebtedness against the assignor, the burden was on the bank to prove the amount of the assignor's indebtedness.

Appeal from Municipal Court, Borough of Brooklyn, Sixth District.

Action by the Borough Bank of Brooklyn against Abraham Rosensweig and wife. From a Municipal Court judgment for defendants, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and WOODWARD, JJ.

Jeremiah T. Mahoney and Vincent L. Leibell, for appellant.

Meyer London, for respondents.

THOMAS, J. The defendants are husband and wife. On March 9, 1910, the husband made his promissory note for $610, payable to

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himself: Thereupon he and his wife indorsed it, and the same was delivered to the plaintiff in renewal of a note for existing indebtedness. On January 10, 1911, the holder applied thereon $143.78, the amount of the maker's deposit with the bank, and this action is brought to recover the balance, $467.47, with $35.30 interest. The defense is that the note is without consideration, and that the plaintiff held moneys of the maker applicable to it, and he interposes a counterclaim for excess of payment. The defense is based upon the contention that the maker was the assignee of the interest of one Jaret on account of an unpaid deposit with plaintiff in the sum of $540.21, and that the sum, together with interest paid after the filing of the assignment with the plaintiff, would make an excess payment of $131.25, which is the subject of the counterclaim. The plaintiff answers this by the contentions that Jaret assigned his deposit while the plaintiff was in the hands of a receiver, and that it was not — could not be — accepted as an offset to defendant's note, and that, in addition, Jaret's deposit was to the extent of $250 applicable to the payment of a note indorsed by Jaret, and that it was so applied; that the plaintiff resumed business, and later came again into the hands of a receiver, where it now is; that Jaret revoked the assignment to the defendant, and, upon notice by the receiver of deposit credited to him, proved his claim therefor. The plaintiff's further contention, that Jaret did not duly assign the deposit, does not accord with the duplicate written assignment (Exhibit 1), with the evidence that the other copy was filed at its date with Thompson, the manager at the plaintiff's banking office, with the concurrent conversation with him, with the defendant's evidence as to the consideration for the assignment, with Thompson's testimony of a receipt of the assignment, with the minute noted opposite the Jaret account, or with Jaret's testimony that he made the assignment.

The first question is: What interest did the assignment carry to the assignee? It did not give him the right to have it applied on the note pending the receivership. But the plaintiff resumed business, and the deposit remained intact, and, subject to any just right of application to Jaret's indebtedness, became the property of the assignee, unless the parties to the assignment agreed to cancel it. Jaret gave evidence tending to show that the parties did agree that the assignment should be returned to the assignor, which Rosensweig denied. The court has dismissed the complaint, and thereby presumably found that Rosensweig was entitled to the benefit of the assignment, and the dismissal of the counterclaim is not necessarily inconsistent therewith. If Rosensweig was entitled to the application of the deposit on the note, the next inquiry is whether the right was subject to the deduction of Jaret's indebtedness. The evidence does not show when the note indorsed by Jaret was due.

The plaintiff, claiming the lien, was bound to establish it by showing the due date of the note. It is true that the claim was made at the time of the first presentation of the assignment, but it was not substantiated by proof. Hence the court was justified in finding that the lien did not exist. It is true that the defendant continued paying on his indebtedness and renewing notes therefor to the time of giving the note in suit; but he states that he also continued to assert his rights under the assignment, and so the matter stood at the date of

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the second receivership. Therefore the defendants were entitled to offset the Jaret deposit. The amount claimed by plaintiff is $502.77, which is more than met by the amount of the Jaret deposit, $540.21. The plaintiff has been overpaid, and, although the counterclaim for the excess has not been allowed, the defendant has not appealed.

The judgment should be affirmed, with costs. All concur.

Decision No. 1446.

RUSSELL v. FIRST NAT. BANK OF HARTSELLE.

(Appellate Court of Alabama. November 14, 1911. Rehearing Denied December 14, 1911.)

56 So. 868.

BANKS AND BANKING — CHECKS.

As a general rule, where a check is drawn payable to an actually existing person, and his indorsement thereof is forged, payment by the bank on which it is drawn is not an acquittance.

Payment by the bank on which it is drawn of a check with the payee's indorsement forged is not an acquittance, though it also bears the indorsement of other banks through which it has passed; it having used no diligence to ascertain whether the payee's indorsement was genuine, and not having shown the other banks had used any.

Even if the fact that the indorsement of the payee of a check was forged by a person of the same name, living where the bank which first cashed it was located, could affect the liability to the drawer of the bank on which it was drawn, which subsequently paid it, an indorsement by such person cannot be presumed.

The rule that, where one, by representing that he is a certain other person, induces another to draw a check in his favor in the name of the person he represents himself to be, the drawer cannot complain of its payment by the bank on which it is drawn, when indorsed by such impostor in the name assumed by him, does not apply where a check, payable to a certain person, is delivered to another on his false representation that he is the payee's agent, and is paid on said impostor's forged indorsement of the payee's name.

Where H., falsely claiming to be F.'s agent, delivered to R. a deed of land, F.'s signature to which as grantor was forged, and received from R. a check, payable to F., the bank on which it was drawn, being sued by R., on the ground that it was liable for payment of the check on the forged indorsement of F.'s name, may not introduce the deed in evidence for comparison of the signature thereto with that of the indorsement of the check; it being immaterial whether or not they are the same.

As regards the liability of the bank on which a check is drawn for paying it on a forged indorsement of the payee's name, it is immaterial that the land, for payment of which the check was given, was worth more than was being paid for it.

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by T. J. Russell against the First National Bank of Hartselle, Ala. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

A. J. Harris, for appellant. Tidwell & Sample, for appellee.

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DE GRAFFENRIED, J. Frank Framhold is now and has been for the past twenty-one years a resident of Cincinnati, Ohio. During that period he has owned 160 acres of land, which is situated near Hartselle, in Morgan county, Ala., and which appears to be valuable principally for its timber. During the period above referred to, no one has been in the actual occupancy of the land, and Framhold's possession of it was that possession which is referable to his title. So far as the record discloses, he possesses and has possessed, during the above period, an unincumbered fee simple title to the land. He appears to have had relatives in Alabama, but seems to have known but little of them, and was himself a stranger to the people of Morgan county. It further appears from the evidence that he had no agent representing him in Morgan county. It seems that it was the custom of the tax assessors of that county to annually forward to him, at his address in Cincinnati, an assessment blank, and upon such blank he assessed the lands for taxation, and returned the assessment to the assessor at Hartselle. It seems that his taxes were paid by him direct to the tax collector, but whether by checks or post office orders we do not know.

It further appears from the testimony that Framhold had an uncle, who was about sixty-five years of age, and who resided, certainly for a part of the above period, in different parts of Alabama; and that the name of this uncle was Frank Framhold. There is some evidence tending to show that Frank Framhold, the uncle of the Framhold who owned the land, resided for five or six years in Birmingham; and it may be that he resided at that place during that period which is covered by the transaction out of which arose this controversy. Frank Framhold, the nephew and the owner of the land, does not seem to have known much of his said uncle, as it appears from the testimony that he had not seen him for sixteen or seventeen years.

One Claud Harris, who was the son of a man who appears to have been the tax assessor of Morgan county for a period of six years, resided in Hartselle, and it appears from the evidence that he aided his father in the performance of his duties as such tax assessor. It further appears from the evidence that the father of Claud Harris died while he was the tax assessor of said county, and that Claud Harris acted as such tax assessor from the time of his father's death until his successor was duly and regularly appointed. We gather from the evidence that the transaction out of which this litigation arose either occurred while Calud Harris was in the tax assessor's office, or shortly thereafter.

The appellant, desiring to buy the said 160 acres of land, went to the said Claud Harris, and asked him if he knew who owned the land, and whether it was for sale. Claud Harris informed appellant that the land belonged to Frank Framhold; that it was listed with him for sale for $640, and that Frank Framhold lived in Birmingham; and that if he desired the land he could get it at that price. Thereupon appellant told Harris that he was willing to pay $640 for the land, and would do so upon the execution and delivery to him of a good and sufficient deed, signed and executed by Frank Framhold, and conveying a fee-simple title to the land. Harris then told appellant that he would go to Birmingham and get the deed; and there is evidence tending to show that Harris, about that time, went to Birmingham, and

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that, in the meantime, appellant had the title investigated, and found, upon investigation, that the title to the land was good in Frank Framhold. It further appears from the evidence that Claud Harris, who was then in Hartselle, called appellant up over the telephone, and told him that he had obtained the deed from Frank Framhold, and was ready to deliver it to him upon the payment of the money. Thereupon appellant met the said Harris in the banking house of appellee, and Harris exhibited to him a deed, which was regular on its face, and which purported to be signed by Frank Framhold, and which purported to convey to appellant an unincumbered fee-simple title to the said land, and which purported to have been duly witnessed by two witnesses, and to have been duly acknowledged before a notary public in Birmingham, Ala. Claud Harris stated to appellant, at the time he handed appellant the deed, that his commission for making the sale was ten per cent. and that he desired two checks; one payable to the said Claud Harris for the ten per cent., and the other to said Frank Framhold. Appellant declined to do this, stating that he knew nothing of the arrangement which had been made between Claud Harris and Frank Framhold, and thereupon drew a check in favor of Frank Framhold for $640, and had the appellee to certify the check, and then delivered the check to Harris, to be by him delivered to Frank Framhold. Thereupon appellant took his alleged deed, assumed such possession of the land as it was capable of, assessed it for taxation, and in the fall of the year filed the deed for record in Morgan county, and it was recorded there.

The check was, it appears, first negotiated in Birmingham, Ala. It appears to have been indorsed by Frank Framhold, Claud Harris, J. B. Hopkins, the First National Bank of Birmingham, which guaranteed all prior indorsements, and by the People's Savings Bank, which also guaranteed all prior indorsements. It was paid by the appellee upon the faith of the guaranty as to prior indorsements by the above Birmingham banks. The appellee did not know Frank Framhold or his signature, and made no inquiry as to the genuineness of his signature appearing on the back of said check; but it did know the Birmingham banks, knew that they were solvent, and relied exclusively upon their guaranties.

About a year after the payment of the check, Frank Framhold came to Hartselle, and appellant then learned, for the first time, that said Frank Framhold had not only not signed the deed, but that he had never heard of it, and that he had not only not indorsed said check, but that he had never heard of it. In other words, appellant then learned, for the first time, that said deed was a forgery, and that said Framhold's signature as the indorser of said check was also a forgery. Thereupon appellant immediately withdrew any claim that he had previously been making to said land on account of said deed, and immediately demanded of appellee the payment of said $640 which it had paid on said check and charged to appellant's account. The appellee refused to pay appellant said sum, and this suit was brought by appellant against appellee for its recovery.

As a general rule, where a check is drawn, payable to the order of any actually existing person, if the order or indorsement of such payee is forged, payment by the bank on which it is drawn is not an acquittance. The depositor has directed payment to be made in a

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certain manner; a payment made otherwise than according to his directions is no discharge of a bank's obligation towards him. A check or bill, payable to order, is authority to the banker only to pay it to the payee, or to a person who becomes the holder by a genuine indorsement. Morse on Banks and Banking, vol. 2 (3d Ed.) § 474.

The appellee recognized the above rule, and it undertook to relieve itself of responsibility by claiming that appellant, through his negligence, had enabled the man who committed the forgery to successfully perpetrate the fraud. It in no way undertook to show what, if any, diligence was exercised by either of the banks in Birmingham when they received the check to ascertain whether the payee had actually indorsed the check; and it showed, by its own evidence, that it paid the check without any investigation as to the genuineness of the signature of Frank Framhold as an indorser thereof, and that it paid it solely upon the guaranty as to prior indorsements by the banks in Birmingham. It exercised, when it paid the check, no diligence to ascertain whether Framhold's signature on the back of the check was genuine, and it offered no evidence that the Birmingham banks had done so.

As was said by the Supreme Court of Michigan, in the case of Judson Harmon, Receiver, v. Old Detroit National Bank, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467: "In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein; it evidently relied upon the identification made by the bank in Denver, Colo., where the draft was cashed. and whether that bank took the requisite precaution or not we do not know. It would naturally excite suspicion that a check drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse on Banks and Banking, § 466; Ellis v. Ohio Life Ins. & T. Co., 4 Ohio St. 628, 64 Am. Dec. 610. The court in the case of Ellis v. Ohio Life Ins. & T. Co., supra, said: 'Where the negligence reaches beyond the holder, and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot in negligent disregard of this duty retain the money obtained upon a forged instrument.' The negligence of the Denver bank is imputable to the defendant."

It is contended by appellee that, as there was a man by the name of Frank Framhold, the uncle of the owner of the land, who may have been living in Birmingham, and as he may have been the man who signed the alleged deed, and as he may have been the man who also signed his name on the back of the check, therefore there was evidence before the jury which authorized them to infer that the Birmingham banks received the check upon the genuine indorsement of Frank Framhold, the uncle, under a mistaken belief that he was the real payee of the check; and that therefore there was some evidence in the case upon which the appellee could predicate a defense on that ground. A signature, with intent to defraud, by another person by

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the same name as the person to whom a check is drawn is just as much a forgery as if the names were different. In this case an intimation by us of an opinion as to whether the acceptance, by the banks in Birmingham, of the check in good faith from Frank Framhold, the uncle, and the payment of the money to him would or would not, under all the circumstances surrounding the case, furnish appellee with a defense to the suit would be mere dictum. If Frank Framhold, the uncle, indorsed the check, he was guilty, under the undisputed evidence, of forgery, and, as there is no evidence whatever that he did indorse it, we cannot presume that he did so. The presumption of the law, on the contrary, is that he did not.

There appears in a community occasionally an imposter — a person assuming the name of some other person, for the purpose of imposition or fraud. In such cases, the general rule seems to be that, where the impostor assumes to be, and by such assumption induces a drawer of a check to believe he is in fact, the person he claims to be, and is by the drawer of the check actually named as payee in the check, then the drawer of the check has no right to complain of the payment of the check by the bank upon which it is drawn, if it was actually indorsed by the impostor, and he received the money. But this rule does not apply ordinarily to a case where the impostor merely assumes to be the agent of the person named as the payee, and not the payee himself; for, while the drawer, by delivering the check to such a person, may be regarded as vouching for him as the agent of the payee, he does not vouch for his right to indorse the payee's name. Judson Harmon, Receiver, v. Old Detroit National Bank, supra.

In the present case, there was no one, so far as the evidence discloses, in Birmingham or elsewhere who personated Frank Framhold. The evidence does show that Claud Harris falsely represented himself to be the agent of Frank Framhold, and that he, in person, or by the aid of some confederate, forged Frank Framhold's signature on the back of the check. The fact that he, either in person or with the aid of a confederate, also forged the same name to a deed does not, it seems to us, throw any light upon this case, or in any way help appellee. No banker who handled the check ever saw the signature to the deed, and it cannot be said that the signature to the deed in any way caused the bankers, or any of them, to cash the check.

We can see nothing in the facts of this case which takes it without the operation of the well-established rule that a banker on whom a check is drawn must ascertain at his peril, the identity of the person named in it as payee; and we can see nothing from which a reasonable conclusion can be drawn that any bank connected with this transaction was misled by an act of negligence or other fault of appellant, justifying the mistake which was made in the payment of the check. Murphy v. Metropolitan National Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595.

It is true that the delivery by appellant of the check to Harris enabled Harris, in person or by the aid of a confederate, to commit a forgery, but appellant had the right, when he delivered Harris the check, to presume that when the check was presented for payment the bank to which it was presented would exercise those precautions with reference to the genuineness of the signature of the payee that the law in such cases requires. This the evidence altogether fails to

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show. Murphy v. Metropolitan National Bank, supra. The stability of business requires that when a rule of law is announced it shall be adhered to in all cases covered by it, although hardships may thereby at times result; for "the known certainty of the law is the safety of all." 2 Coke upon Littleton, 395a.

The trial court, against the objection of appellant, permitted appellee to introduce in evidence the alleged deed from Frank Framhold to appellant. As the evidence shows, without dispute, that Frank Framhold never signed the deed, and never acknowledged it before any person, the deed and the acknowledgment were absolutely void. Grider v. American Freehold Mortgage Co., 99 Ala. 291, 12 South. 775, 42 Am. St. Rep. 58; Chattanooga N. B. & L. Association v. Vaught, 143 Ala. 389, 39 South. 215. A void thing is, in legal effect, no thing, and has no effect whatever. Words and Phrases, vol. 8, p. 7332. We are therefore of the opinion that the court erred in permitting appellee to introduce the said deed in evidence. It was admitted in evidence by the court for the purpose of permitting a comparison of the handwriting of the words "Frank Framhold" on the back of the check and to the signature to the deed; but we cannot, as we have above stated, see how this comparison, whether favorable or unfavorable, could have been of any legitimate service to the jury in determining any of the legitimate inquiries in the case. The check was delivered to Harris for Frank Framhold, the owner of the land, to be by Harris delivered to him. It was not delivered to him for the purpose of enabling him, through forgery, to commit a fraud upon any person, and there is nothing in the record indicating that it was so done.

The trial court also permitted some of the witnesses for appellee to testify that, in their opinion, the 160 acres of land was worth much more than $640. The witnesses who so testified showed by their testimony, in the first place, that they had never been over the land, and were not competent to testify, on that account, to its value, and, in the second place, it mattered not to appellee, or any banker into whose hands the check came, whether appellant was paying full value for the land or not.

It therefore appears to us that the court below committed error in the trial of this case which was manifestly prejudicial to appellant, and this cause is therefore reversed and remanded.

Reversed and remanded.

Decision No. 1447.

UNITED STATES NAT. BANK OF VALE v. FIRST TRUST & SAVINGS BANK OF BROGAN.

(Supreme Court of Oregon. December 5, 1911.)

119 Pac. 343.

BANKS AND BANKING — CASHIER — BILLS AND NOTES — DRAFTS.

A cashier of a bank cannot delegate to an officer of another bank authority to accept drafts in such cashier's name.

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Drafts on a State bank were presented at a national bank, and the vice-president of the national bank, with the authority of the cashier of the State bank, executed a written acceptance in the name of the cashier of the State bank. Held that, as one person cannot be an agent and a party at the same time except with the full knowledge and consent of the principal, the acceptance by the vice-president was not authorized, and hence was not evidence of a written acceptance under L. O. L. (Ore.), § 5965, requiring the acceptance of a bill to be in writing and signed by the drawee.

Where a bill of exchange is drawn upon one bank in favor of another, evidence that the bank upon which the bill was drawn could have obtained sufficient of the drawee's funds for payment was immaterial in an action on the bill, for L. O. L. (Ore.), §§ 5960, 6022, provides that a check or bill does not operate as an assignment of any part of the funds of the drawer, and that the payor is not liable until acceptance.

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by the United States National Bank of Vale against the First Trust & Savings Bank of Brogan. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

This is an appeal by defendant from a judgment upon the verdict of a jury for $280.47. This action is based upon two inland bills of exchange for $120.47 and $160, respectively, upon which the plaintiff charges defendant as an acceptor; the first, with the alleged acceptance, being in the following form:

"BROGAN, OREGON, *Nov.* 22, 1910.

No. ———. First Trust & Savings Bank:

Pay to the order of U. S. National Bank ($120.47) one hundred & twenty 47/100 dollars. MORRISON & SON.

"O. K. by TSCHIRGI, Cashier, 11/22/10."

The second bill is in the same form, except as to amount and name of payee.

The complaint alleges the corporate existence of the plaintiff and defendant; the execution of the bills and the delivery thereof to plaintiff; the presentment of the bills to defendant and its due acceptance of the same in writing, upon the face thereof, as follows: "O. K. Tschirgi, Cashier." At said time, E. L. Tschirgi was cashier of the First Trust & Saivngs Bank, of Brogan, Ore. Plaintiff, relying upon said bills and their acceptance by defendant, then and there paid to the drawer, Morrison & Son, the amount of the bills. November 29, 1910, plaintiff presented the bills to defendant for payment, which was refused. Two causes of action are separately stated in substance as above. As to the alleged acceptance as it appears upon the face of the bills in evidence, it is noticed that the word "by" is omitted in the complaint. Defendant by its answer denies the acceptance of the bills, or that they were presented for acceptance, and admits that defendant refused to pay the same, and avers that Morrison & Son, at the time, had no funds deposited with defendant with which to pay them. The reply puts in issue the new matter of the answer, and avers that at the time of the transaction defendant held certain assignments of accounts, and expected to get returns from certain consignments of alfalfa seed belonging to Morrison & Son.

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G. W. Hayes (Hayes & Crandall, on the brief), for appellant. J. W. McCulloch (H. C. Eastman and McCulloch, Soliss & Duncan, on the briefs), for respondent.

BEAN J. (after stating the facts as above). It appears from the evidence, which is all contained in the record, that Mr. J. P. Dunaway, at the time the transaction occurred, was the vice-president and acting cashier of the plaintiff bank, at Vale, Ore.; and Mr. E. L. Tschirgi was the cashier of the defendant bank at Brogan, Ore. At the date mentioned on the bills, W. J. Morrison, of the firm of Morrison & Son, gave the plaintiff the two bills in payment of a note, and for $160 in cash.

Mr. J. P. Dunaway testified that he called Mr. Tschirgi up over the telephone, a few minutes after he had taken the bills or checks of Morrison & Son, and told him that Mr. Morrison had stated that he had arranged with Mr. Tschirgi to take care of his checks, and he wanted to know if he would do so if the checks were presented. Mr. Tschirgi answered "that they would not;" that Mr. Morrison was looking for a remittance from Weiser, and, if the same were received, he would take care of the checks, but unless the money came he could not accept them.

After Mr. Dunaway phoned to the commission company in regard to the remittance, and reported to Mr. Tschirgi that he was informed that the remittance had been mailed, and after Mr. Morrison talked over the phone to Mr. Tschirgi, Mr. Dunaway said to the latter, "I'll mark the checks O. K. by you and send them to Boise for clearance," and Mr. Tschirgi said, "All right," and he so marked the checks. To the question, "It was at that time that Mr. Tschirgi told you to sign his name on that check?" Mr. Dunaway answered: "I didn't say that. I told him what I would do, and he said, 'all right.'" On cross-examination, to the question, "You knew as a banker, after they (the checks) were certified, that the bank would be holden?" Mr. Dunaway answered: "Yes, sir; then I knew it was customary, if the cashier said it would be paid, it would be paid."

The other evidence on the part of plaintiff tended to corroborate Mr. Dunaway's testimony; but there was no other proof of any authority given to the latter to accept the checks for the bank of Brogan.

At the close of plaintiff's case, defendant's counsel moved the court for a nonsuit, which was denied. We will, however, pass this and consider the whole record under section 3, art. 7, of the Constitution, as amended by Laws 1911, p. 7, which among other things, provides that: "Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect

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as decrees are now entered in equity cases on appeal to the Supreme Court."

The evidence on behalf of defendant tended to show that E. L. Tschirgi, as cashier of the Brogan Bank, informed Dunaway that Morrison & Son had no funds in the bank of Brogan; that their account was overdrawn, and the firm was at that time owing the bank on some paper; that his bank therefore could not pay the checks unless the funds were there; but that they would take care of the checks if a certain remittance in full came from Weiser; that he did not empower Mr. Dunaway to accept the checks for defendant; that the checks were not paid for want of funds on deposit by Morrison & Son.

Numerous errors are assigned, among them the introduction of the checks and the testimony relating to the making of the memorandum "O. K. by Tschirgi, Cashier," and the instructions of the court submitting the same to the jury, to all of which exceptions were duly reserved by defendant's counsel. Giving to the notation, "O. K. by Tschirgi, Cashier," on the face of the checks, all the meaning that may be claimed on account thereof, we do not think that this memorandum purports to be signed by the bank of Brogan or by Tschirgi, its cashier. At the most it appears to be a notation made by Mr. Dunaway, cashier of the bank of Vale, indicating that Tschirgi, cashier of the bank of Brogan, had approved the checks verbally over the telephone. Tschirgi, as such cashier, had no implied authority to authorize Mr. Dunaway to accept the checks for the bank of Brogan, and there is no evidence in the record that the defendant bank, or any officer thereof, ever empowered Tschirgi to delegate such authority to Mr. Dunaway. Tschirgi, cashier of the bank of Brogan, was its agent, and the general rule is that an agent in whom trust or confidence is reposed, or who is required to exercise judgment, may not intrust the performance of his duties to another. 31 Cyc. 1425; Dorchester & Milton Bank v. New England Bank, 1 Cush. (Mass.) 177; Emerson v. Providence Hat Manufacturing Company, 12 Mass. 237, 7 Am. Dec. 66.

Mr. Dunaway, at the time of the alleged acceptance of the checks, was the vice-president and acting cashier of the bank of Vale. One cannot be a party, and, in the same transaction, an agent of the opposite party, except with the full knowledge and consent of such principal. It was incompatible for the cashier of the plaintiff to act as agent of the defendant in accepting the checks in question. Mechem on Agency, §§ 66, 68. Neither is there any evidence in the record to the effect that the plaintiff ratified or adopted as its own the act of Mr. Dunaway in making the indorsement on the checks. Our negotiable instruments law requires that the acceptance of a bill must be in writing and signed by the drawee. L. O. L., § 5965. There being no competent evidence tending to show that the defendant bank signed an acceptance of the checks, we think it was error for the trial court to admit the memorandum on the checks in evidence.

We come now to the question of the liability of the defendant, independent of the acceptance of the checks. There was much evidence introduced as to the condition of Morrison & Son's account at the bank of Brogan; and the opportunity of the defendant bank to obtain funds from the sale of seed and hay whereby it would be recompensed for the payment of Morrison & Son's checks, which were presented

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for payment November 29, 1910; and as to the arrangement claimed to have been made by Morrison & Son with the bank of Brogan to honor the checks. At the close of the evidence, counsel for defendant requested the court to instruct the jury to return a verdict in favor of defendant. Section 6018, L. O. L., provides that: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The legislative enactment now in force in this State provides that a check or bill does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies to the check. Section 6022, L. O. L. And section 5690, L. O. L., makes a like provision in regard to a bill of exchange. This renders the testimony referred to immaterial. In the absence of an acceptance or certification of the checks involved, the defendant bank was not liable. This is now the law in those States that have adopted the Negotiable Instruments Law (Selover on Neg. Inst. Law, § 93), and in our opinion is decisive of this feature of the case.

However, the complaint alleges the acceptance of the checks by defendant as the basis of this action, and the plaintiff must proceed upon this theory until the end, and recover, if at all, upon this asserted right of recovery. Mescall v. Tully, 91 Ind. 96; Toledo, St. Louis & Kansas City Railroad Company v. Levy, 127 Ind. 168, 26 N. E. 773; Whitten v. Griswold (Ore.), 118 Pac. 1018, decided November 21, 1911.

After a careful consideration of all the matters submitted in this case, we are of the opinion that there was no evidence produced to sustain the allegations of the complaint or to be submitted to the jury, and that the Circuit Court erred in not instructing the jury to return a verdict for defendant.

Therefore the judgment of the lower court is reversed, and the cause will be remanded, with directions to enter a judgment of the same force as upon a verdict, in favor of defendant, in accordance with this opinion.

Decision No. 1448.

BUCKLEY et al. v. LINCOLN TRUST CO.

(City Court of New York, Trial Term. May, 1911.)

131 N. Y. Sup. 105.

BILLS AND NOTES — BONA FIDE PURCHASERS.

Though the deposit by the business manager of a corporation of a check to the corporation indorsed by the manager to the credit of his private account in a bank is a transaction which would put the bank on inquiry, yet, where inquiry would have shown a power of attorney to him authorizing the opening of a bank account for the use of the corporation, the deposit of checks, etc., the withdrawal of the proceeds, the pledging of the corporation's credit, and for such purposes the signing, indorsing, accepting, making, execution, and delivery of checks, notes, drafts, and bills of exchange, and would also have shown a resolution of the corporate directors,

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empowering him to use the checks of the company until he had reimbursed himself for moneys he had personally advanced for the corporation in an amount not exceeding $2,000, the bank would be justified in crediting the manager personally with the proceeds of the check, and the corporation cannot maintain an action to recover such proceeds.

Action by Edward A. Buckley and another against the Lincoln Trust Company. Judgment for defendant.

John H. McCrahon, for plaintiffs.

Bowers & Sands (Wm. H. Van Benschoten, of counsel), for defendant.

GREEN, J. This action is brought to recover the proceeds of a check deposited with the defendant to the personal account of plaintiff's manager upon the theory of defendant's failure to make reasonable inquiry to ascertain whether the manager had authority to indorse the firm name and make deposit of the check to his own personal credit and account. The plaintiffs were copartners in business and employed one Munzer as a resident manager of their business in the city of New York. The evidence shows that Munzer betrayed his employers, the plaintiffs, and is to-day a prisoner confined in the penitentiary on Blackwell's Island. The case was tried by the court upon consent of counsel without a jury, and at the conclusion of the trial both sides moved for a direction of a verdict, which motions are now before the court for its determination. The facts in the case are substantially undisputed, and upon these facts must be drawn the conclusions of law as to the liability or nonliability of the defendant's bank. On or about June 27, 1910, the firm of M. Philipsborn Company, of Chicago, Ill., sent in due course of business its check to the plaintiffs for the sum of $996.62, payable to the order of the plaintiffs in this action. Upon receipt of the check the manager, Munzer, indorsed the check as follows: "E. A. Buckley & Co., Henry Munzer, manager." And underneath followed his own indorsement, "Henry Munzer." The manager then deposited the check to his own personal account in the defendant's bank and received credit therefor. The manager, Munzer, had opened a personal account with the defendant's institution on June 6, 1910, with a deposit of $400 in cash. He thereafter made three deposits, including the check in suit, and closed his account with defendant July 28, 1910. One of the three deposits mentioned other than the check in suit was a check made to the order of the United Suit & Cloak Company, which was indorsed by Munzer as manager, and also deposited to his personal account. The United Suit & Cloak Company, so far as this action is concerned, may be considered as idnetical with the plaintiffs, as their personal and business interests seem from the evidence to be the same. The contention of the plaintiffs in this case, simply stated, is that Munzer converted the check to his own use, and that the form of the check was such as "to throw a shadow thereon," and that the defendant could not in good faith accept it for Munzer's personal account until that shadow disappeared. In other words, that as the check was made payable to a partnership, and indorsed by a manager as manager, and then personally indorsed and deposited to his own account, that was sufficient notice to the defendant to make it liable for Munzer's conversion of

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the check. The defendant maintains that plaintiffs cannot recover in this action: Firstly, because there is a defect of parties plaintiff, and that plaintiffs are not the real parties in interest; secondly, that defendant was not given sufficient notice to put it upon inquiry; and, thirdly, that if it had made inquiry it would have discovered facts sufficient to justify a reasonable man in believing Munzer had authority not alone to indorse checks, but to appropriate the proceeds. In my opinion this case may be disposed of upon the second and third grounds of defendant's contentions above set forth, that as to sufficient notice to put the bank upon inquiry, and that as to the facts which might have been discovered upon inquiry. As to the other points raised in the case, I do not deem them of sufficient importance to merit consideration. It is conceded in this case that the defendant received the check in question without making any inquiry whatever, and deposited it to the personal account of Munzer, the manager. It is conceded that Munzer was the manager of the plaintiffs, and it is conceded that he had authority to indorse checks and notes for the plaintiffs. Whether the bank was justified under all the facts in the case in permitting the proceeds of the check to be credited to the manager's personal account is the real question herein involved.

The law applicable to the question at issue is neither new nor novel, and upon a number of occasions the courts have passed upon some phase of the questions herein presented. See Havana Central R. R. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12; Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585; Rochester & C. T. R. Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890; Sims v. United States Trust Co., 103 N. Y. 477, 9 N. E. 605; Schmidt v. Garfield Nat. Bank, 138 N. Y. 631, 33 N. E. 1084, affirming 64 Hun 298, 19 N. Y. Supp. 252, upon opinion below. The decision in the case at bar may, in my opinion, be safely predicated upon the propositions of law laid down in the Ward Case, supra, applied to the facts here found existing. The court in that case said (192 N. Y. 69, 84 N. E. 587):

"The form of the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president to pay the personal debt of himself and Kiefer in apparent violation of its rights. The effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. The presumption arising from the face of the check was that it belonged to the Hartman Company and that its president had no right to use it to pay his personal debt. The purpose of the law in exacting inquiry under such circumstances is to see whether the apparent situation is the actual situation, or, in other words, to learn whether facts exist to rebut the persumption. The object is not to discover negative facts, or such as would not arouse suspicion, but positive facts which would allay the suspicion already aroused. If, for instance, reasonable inquiry had been made by the trust company, and the result had tended to show that the check really belonged to Umsted and Kiefer and not to the Hartman Company, or that Umsted was authorized by that company to use it as he proposed, then even if the fact were otherwise, such inquiry would have tended to rebut the presumption of illegal use and to protect the title of the trust com-

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pany. The law goes further than this in order to promote the transfer of commercial paper, for it is settled that if no inquiry is in fact made to dispel the presumption, but reasonable inquiry would have led to the discovery of facts which would have dispelled it, the purchaser of the paper is entitled to the benefit thereof the same as if he had learned them by proper investigation."

And again, quoting from the Pavious Case, supra, the court said (164 N. Y. 285, 58 N. E. 115 (52 L. R. A. 790):

"There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicion which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose."

While it is conceded in this case no inquiry was made by the defendant, nevertheless under the authorities (supra) it is entitled to the benefit of any facts which might have existed and which a proper investigation might have disclosed. This leads us to a consideration of the facts as they existed, and as disclosed by the evidence in the case.

The defendant, if it had made investigation, would have ascertained that Munzer was the manager of the plaintiffs' business in New York City, with free power to engage and discharge employees, and that he had full management of the business of the plaintiffs; the defendant would have discovered a power of attorney, executed before the deposit of the check in question, authorizing Munzer, the manager, to open and keep an account in the German Exchange Bank for the use of the plaintiffs, to deposit checks, etc., and to withdraw the proceeds thereof, "or any part or all of the proceeds," to pledge the credit of the plaintiffs, "and for these and all other purposes to sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts, and bills of exchange." While it was true this power of attorney represented the act of the United Cloak & Suit Company, I find and hold from the evidence in this case that the parties and the interests of the plaintiffs and the United Cloak & Suit Company in this action are identical, and that for the purpose of this action they may be considered as the same person. Further investigation would have shown to defendant a letter addressed to the German Exchange Bank, dated June 10, 1910, from the plaintiffs, as follows:

"We hereby authorize and appoint Henry Munzer manager, power of attorney to sign and indorse checks of the United Cloak & Suit Company and E. A. Buckley & Company, by a vote of the majority of directors present at this meeting."

Inquiry by the defendant would have elicited also the following important document in existence before the deposit of the check in suit:

"At a meeting of the directors of this company, held on the 10th day of June, 1910, and on motion duly made and seconded, it was agreed that Henry Munzer, manager of the company, be empowered to bill certain bills and use certain checks of the company until he has reimbursed himself for certain moneys he has personally advanced for the company, the amount not to exceed two thousand dollars."

And still another of the same date allowing said manager the sum

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of thirty-five dollars a week for entertaining the trade, to be retroactive from October 1, 1909, to June 10, 1910, and to continue thereafter without date mentioned. The last two papers are concededly signed by the secretary of the company, and his answer thereto is that he has no recollection of ever seeing them or signing them; that he does not know how his name ever appeared on the papers, except that he put it there. The evidence in this case discloses a method of doing business by the plaintiffs and the United Cloak & Suit Company the most careless and loose of which this court has ever heard. There is no doubt in my mind that Munzer, the manager, has treated the plaintiffs shamefully, and that he has abused the confidence the plaintiffs reposed in him. They, however, clothed him with certain authority as their agent or manager, and they must bear the burdens incident to such investiture of authority.

"When one of two innocent persons must suffer by the fraud of a third, he shall bear the loss who enabled the third person to do the injury by giving him credit and holding him out to the world as his agent." Davis v. Bemis, 40 N. Y. 453, note.

This is the settled law of the State. The defendant in his action, under the form of the check in question, in my opinion, was put upon its inquiry. It made none, however; but nevertheless, under the law, it is entitled to the benefit of whatever facts existed which reasonable inquiry, if made, would have disclosed. The facts above presented would, in my opinion, have been disclosed, for they existed and cannot be gainsaid. These facts, in my opinion, were sufficient "to allay the suspicion already aroused," and if brought to the attention of the defendant would have justified it in crediting the manager personally with the proceeds of the check, even if he in fact did not have the right thereto.

Counsel for plaintiffs raises the point that a rule of the bank required the receiving clerk to first consult an officer of the bank and obtain consent before crediting a deposit of this character, and that this being violated is sufficient upon which to predicate a cause of action. Defendant's counsel answers this contention by insisting that even though the rule were violated, the rule could not obtain to the advantage of a stranger, but only to a depositor of the bank. With neither position do I agree. Even were the rule violated the question would again resolve itself into reasonable inquiry to be made by the bank; and, so far as a stranger to the bank is concerned, I am of the opinion that he would be within his rights in involving the protection of the rule to show knowledge on the part of the officers of the bank of the necessity for making inquiry in regard to checks of the character in suit. I have examined the carefully prepared and elaborate briefs of counsel for the respective parties, both of which have been of great assistance to me, and after such examination and that of the evidence in the case I have arrived at the irresistible conclusion that the evidence is ample and sufficient to have justified the defendant in believing that the manager had authority to deposit the check to his own credit had it made the inquiry; and under the law, the defendant being entitled to the benefit of the facts as they existed, even though no inquiry were made, I award judgment for the defendant, and let it be entered accordingly.

Judgment for defendant.

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Decision No. 1449.

MELTON et al. v. PENSACOLA BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. July 12, 1911.)

190 Fed. 126.

BILLS AND NOTES — BONA FIDE PURCHASERS — PLEDGEE — BANKS AND BANKING — NOTICE.

In an action on a promissory note by one claiming to be an innocent purchaser, the production of the note by the plaintiff, properly indorsed by the payee, make out a prima facie case that plaintiff had become its holder for value, before maturity, in the usual course of business, and without notice of anything to impeach the title.

Under the rule of the federal courts, a transfer of a negotiable note by indorsement before maturity as security for an antecedent debt is a transfer for value in due course of business.

A bona fide holder of a negotiable instrument, who, for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, took it by indorsement before its maturity, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without legal validity.

A pledgee by indorsement of a negotiable note held as collateral may maintain an action at law thereon in his own name.

Where a note was made on a printed blank giving the name of a bank as the place of payment, which bank to the knowledge of most, if not all, of the makers, had previously changed from a State to a national bank, changing its name, but continuing in business in the same building, the fact that the name of such bank was correspondingly changed in the note after its execution, without the knowledge of the makers, did not constitute a material alteration, which invalidated the note in the hands of a bona fide holder.

That a note was blank as to the name of the payee when signed, and was filled in by the person to whom it was delivered, does not impeach its validity in the hands of a bona fide purchaser without notice.

Where the cashier of a bank pledged notes with such bank as collateral security for his own indebtedness, the bank is not chargeable with his knowledge of any infirmity in such notes.

In Error to the Circuit Court of the United States for the Western District of Kentucky.

Action at law by the Pensacola Bank & Trust Company against R. E. Melton, J. S. Thornsberry, J. B. Ramsey, J. R. Ramsey, E. J. Ramsey, C. H. Ramsey, and D. H. Sharp. Judgment for plaintiff, and defendants bring error. Affirmed.

Sweeney, Ellis & Sweeney (J. W. Powell, of counsel), for plaintiffs in error.

John B. Baskin (R. A. Miller, Robt. S. Todd, and Blount & Blount & Carter, of counsel), for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

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SANFORD, District Judge. This is an action at law brought by the Pensacola Bank & Trust Company, a Florida corporation, against R. E. Melton and other plaintiffs in error, all citizens of Kentucky, on a promissory note for $5,467.50, together with another note for $5,000, as to which the plaintiff was subsequently permitted to dismiss the suit without prejudice and which is not now involved. There was a trial by jury. At the conclusion of all the evidence each side moved the court for peremptory instructions in its favor. The defendants' motion was overruled, and under peremptory instructions from the court the jury returned a verdict in favor of the plaintiff and against the defendants for the amount of the note remaining in suit, with interest. Judgment was rendered on this verdict; and the defendants' motion for new trial having been overruled they have brought this writ of error to review the judgment.

First. The defendants have assigned various errors to the action of the trial court in overruling their motion for peremptory instructions, in not submitting the case to the jury to pass upon the facts, and in directing a verdict in the plaintiff's favor. In the court below the defendants excepted to the action of the court in overruling their motion for peremptory instructions, but did not except to the direction of the verdict in plaintiff's favor, or to the action of the court in not submitting the case to the jury for its determination of the facts.

Since, however, in this case each side moved the court for peremptory instructions in its favor, unaccompanied by requests for specific instructions in case the request for a directed verdict should be denied, this amounted to an admission by each side that there was no conflict in the evidence and no question presented for the jury, and to a request to the court to find the facts and direct the verdict accordingly. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; United States v. Bishop (C. C. A. 8), 125 Fed. 181, 183, 60 C. C. A. 123; Anderson v. Messenger (C. C. A. 6), 158 Fed. 250, 253, 85 C. C. A. 468; American Nat'l Bank v. Miller (C. C. A. 6), 185 Fed. 338, 341. And when, pursuant to such requests, the court accepted these waivers, and by its peremptory instructions determined the questions of fact and law in favor of one of the parties, each is estopped from assailing its finding upon disputed issues of fact, and is limited in the appellate court to a review of the question whether there was any substantial evidence not inconsistent with the undisputed evidence in the case, upon which to support the verdict as directed, under the issues of fact and law presented by the pleadings. United States v. Bishop, supra, 125 Fed. at page 183, 60 C. C. A. 123; American Nat'l Bank v. Miller, supra, 185 Fed. at page 342.

Obviously, therefore, the assignment of errors relating to the action of the trial court in not submitting the case to the jury for its determination of the facts, must be overruled. And since the question whether the trial court was in error in overruling the defendants' motion for peremptory instructions, to which exception was duly reserved, necessarily involves the same question as that in reference to its action in granting peremptory instructions in favor of the plaintiff, the two matters being correlative, we proceed to the consideration of the fundamental question involved under this review, namely; whether there is substantial evidence in the record not incon-

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sistent with the undisputed evidence in the case upon which to support the verdict as directed, under the issues presented by the pleadings.

The amended petition which, under order of the court, was filed as a substitute for the original petition as previously amended, alleged that on April 23, 1906, the defendants with one G. C. Scudamore by their note of said date, filed with the petition, promised to pay to the order of said Scudamore on or before May 15, 1908, the sum of $5,467.50, with interest from May 15, 1906, payable at the First National Bank of Sebree, a corporation under the National Banking Act; that after the execution and delivery of said note, before its maturity and for value, the said Scudamore indorsed and delivered the same to the plaintiff; and that the plaintiff was then the owner and holder thereof.

The answers admitted that the defendants had signed this note with Scudamore, but denied that at the time of signing and delivery there was any payee named in the note or that it was payable at the First National Bank of Sebree, or that Scudamore before its maturity, had, for value, indorsed or delivered the same to the plaintiff, or that the plaintiff was the owner or holder of this note; and further averred that this note was signed and delivered by them to Scudamore for the purpose of being used by him for borrowing money from some bank in Nashville, Tennessee, with which to buy land for them in Florida; that the notes were signed and delivered to Scudamore with the name of the payee left blank, with the understanding that this blank should be filled in by the name of the bank lending the money for the purchase of the land which was the sole consideration for the execution of the note; that Scudamore did not purchase the land in Florida or borrow any money on the note for the defendants, and they never received any consideration therefor; that when Scudamore failed to discount the note for the purpose for which it was given he fraudulently and without defendants' knowledge inserted his own name as payee thereof and negotiated a loan for himself from the American National Bank of Nashville, Tennessee, and to secure such loan fraudulently hypothecated the note in suit as collateral security and indorsed the same without the knowledge or consent of the defendants; that this was the only indorsement which Scudamore ever made upon the notes and was made for this sole purpose; that thereafter said Scudamore paid his loan to said American National Bank and the note in suit which had been deposited by him as collateral was returned to him by said bank; that Scudamore had never delivered this note to the plaintiff and it had never owned said note or had it in its possession or any right, title or interest therein, and that if it had been delivered by Scudamore to the plaintiff it was delivered after its maturity, and only with the indorsement that he had originally made to the American National Bank; and that it was at the date of such delivery a non-negotiable note subject to all defenses allowable against such note.

The plaintiff filed replies in the nature of a general denial of the matters in confession and avoidance relied on in the answers. The plaintiff subsequently filed a pleading entitled an "Amended Petition," in which "amending the petition to conform to the proof" it alleged that Scudamore (who is shown by the proof to have been the cashier

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of the plaintiff at the time of these transactions) had discharged his obligation to the American National Bank for which the note in suit had been deposited as collateral by his individual check drawn on the plaintiff, and that while he then had no funds to his credit with the plaintiff and the plaintiff was not indebted to him in any sum, had, without the knowledge and consent of the plaintiff, paid his said individual check to the American National Bank with the funds of the plaintiff and thereby discharge his obligation to the American National Bank and obtained the surrender of the note in suit deposited with it as collateral. This "Amended Petition" concludes: "Wherefore plaintiff prays as in the petition as amended." The answer of the defendants to this "Amended Petition" was in the nature of a general denial.

The material evidence introduced at the trial, so far as the same need be recited, was substantially as follows:

The original note, which was filed with the plaintiff's petition, was produced at the trial and exhibited in evidence. It has, by agreement, been sent up as a part of the record, and shows on its fact that it was executed on a printed blank designating the Peoples' Bank of Sebree as the place of payment, but that the name "Peoples' Bank" has been erased by drawing an ink line through it and the name "First National Bank" inserted in lieu thereof, with a stamp. It was further shown by officers and employees of the American National Bank that this note was deposited with said bank as collateral by Scudamore on April 26, 1906, to secure a loan then made Scudamore by said bank; that this loan was finally paid by Scudamore on August 14, 1907, by check drawn on the plaintiff, the note in suit which had been deposited by him as collateral being then returned to him by the American National Bank.

There was also evidence, though of a somewhat indefinite character, as to the pledging by Scudamore to the plaintiff as security for loans made to him, of the defendants' note in suit before its maturity, with the other $5,000.00 note of the defendants originally sued on.

J. B. Perkins, who was plaintiff's cashier up to August 1, 1907, but who then resigned, returning as cashier about Thanksgiving, 1907, proved the execution by Scudamore of two notes to the plaintiff, one dated June 28, 1907, for $6,300.00 due ninety days after date, and the other dated November 2, 1907, for $5,500.00 due sixty days after date, and testified that Scudamore executed these notes for money which he borrowed from the plaintiff, and stated that he gave these notes "as collateral with" the "notes of R. E. Melton and others sued on in this case." He further states that he did not see the $5,000.00 collateral note at the time the bank took it, and first saw it in January, 1908.

George P. Wentworth, a director and member of the finance committee of the plaintiff, in answer to a request to state all the officers and representatives of the plaintiff who took part in the transaction with Scudamore at the time the defendants' two notes were pledged with the plaintiff as collateral security, stated that O. L. Bass, the president, and several other directors were present at the time these notes were pledged as surety; that Scudamore kept the records of the directors' meeting and they do not disclose the particular date on which the loan was acted on; that he had no knowledge that the name

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of the Peoples' Bank had been changed to the First National Bank in the note in suit, and first learned of the claim that there had been a change in the note when his attention was directed to it by a representative of the plaintiff after he had received a letter from one of the defendants, probably four or five months after they had taken the note as collateral.

O. L. Bass, president of the plaintiff, in answer to a similar question, stated that he took the notes and submitted them to a meeting of the directors of the plaintiff, but could not remember which directors were present on that afternoon; that he had no knowledge of the fact that the name of the Peoples' Bank had been changed to the First National Bank, that if any of the officers present at the time had such knowledge they did not make it known, and that he first learned of the claim that there had been a change some time during November, 1907.

It further appeared that at the time of the trial Scudamore had been adjudged insane and was then confined in the State Hospital for the Insane.

The several defendants, all of whom except J. H. Sharp, testified in their own behalf, stated that at the time they signed and delivered the note in suit to Scudamore it was payable at the Peoples' Bank of Sebree, and that the place of payment was thereafter changed without their knowledge and consent to the First National Bank of Sebree, and further that at the time the note was executed and delivered to Scudamore his name did not appear on it as payee. On their cross-examination, however, it was shown that the Peoples' Bank of Sebree had been a State bank; that it was changed from a State bank to a national bank, under the name of the First National Bank of Sebree, in 1904, about two years before the execution of this note, and that the First National Bank had continued in business with the same directors, the same officers and the same stockholders as the Peoples' Bank and did business in the same building in the town of Sebree, the name "Peoples' Bank" being still carved on the stone step of the First National Bank.

J. B. Ramsey, one of the defendants, and president of the First National Bank, testified that he and every one of the defendants knew at the time they signed the note where the Peoples' Bank of Sebree was or had been, knew it had gone out of business and been changed to the First National Bank, and that when the note was drawn on the old form of stationery and made payable at the Peoples' Bank he knew what place was intended and was not misled by the change in the place of payment or deceived in any way.

The other defendants who testified also admitted in substance that they knew that the Peoples' Bank had been changed to the First National Bank and that the First National Bank was occupying the same building in which the Peoples' Bank had done business.

Under the foregoing testimony we are of opinion that there was substantial evidence sustaining the conclusion reached by the trial court in directing the verdict in favor of the plaintiff on the note in suit, and that this conclusion was not in conflict with any of the undisputed evidence in the case, for the following reasons:

The defendants having by their answer admitted the fact that Scudamore had signed his name as indorser of the note at the time

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he delivered it to the First National Bank proof of the fact of the indorsement which would otherwise have been indispensable (Collins v. Gilbert, 94 U. S. 753, 754, 24 L. Ed. 170), was thereby waived. See Mills v. United States Bank, 11 Wheat. 431, 439, 6 L. Ed. 512, Birket v. Edward, 68 Kan. 295, 74 Pac. 1100, 64 L. R. A. 568, 104 Am. St. Rep. 405, and New Haven Mfg. Co. v. Pulp & Board Co., 76 Conn. 126, 55 Atl. 604. Therefore proof of the fact of indorsement not being required under the pleadings, the fact that the note was in the possession of the plaintiff, exhibited with its petition and offered in evidence, made out a prima facie case that the plaintiff had become its holder for value before maturity in the usual course of business, and without notice of anything to impeach its title. Goodman v. Simonds, 20 How. 343, 50 L. Ed. 934; Collins v. Gilbert, 94 U. S. 753, 754, 24 L. Ed. 170; Hays v. Hathorn, 74 N. Y. 486, 491; McCarty v. Louisville Banking Co., 100 Ky. 4, 11, 37 S. W. 144; Hargis v. Louisville Trust Co., 30 S. W. 877, 17 Ky. Law Rep. 218, 219. Furthermore, while the evidence as to the actual pledging of this note by Scudamore to the plaintiff is meagre in detail and vague as to dates, we think that on the whole there is substantial evidence that the note in suit was in fact pledged as security for his note or notes, at some time prior to the maturity of the note in suit; and that, there being no evidence in the record either of want of consideration for the note, or of notice to the plaintiff thereof or of other defenses, the plaintiff must be held to have made out its case, not only prima facie, but under the greater weight of the evidence, as a holder of the note for value in due course of trade, before maturity, without notice of equities or defenses.

As the proof shows that the note in suit was pledged to the plaintiff before its maturity, it is immaterial whether it was transferred as collateral to either of the Scudamore notes at the time the loan to him was made, or afterwards to secure his pre-existing indebtedness. The rule is well settled in the federal courts that the transfer of a negotiable paper by indorsement, before maturity, as security for an antecedent debt, is a transfer for value in due course of business. Railroad Co. v. National Bank, 102 U. S. 14, 23, 26 L. Ed. 61; American File Co. v. Garrett, 110 U. S. 288, 294, 4 Sup. Ct. 90, 28 L. Ed. 149; Hamilton v. Fowler (C. C. A. 6), 99 Fed. 18, 22, 40 C. C. A. 47; Scherer v. Everest (C. C. A. 8), 168 Fed. 822, 831, 94 C. C. A. 346; Doe v. Coal & Transportation Co. (C. C.), 78 Fed. 62, 68; D'Esterre v. City of Brooklyn (C. C.), 90 Fed. 586, 593. And see Swift v. Tyson, 16 Pet. 1, 15, 10 L. Ed. 865; Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386; McCarty v. Roots, 21 How. 432, 438, 16 L. Ed. 162; Sawyer v. Prickett, 19 Wall. 156, 166, 22 L. Ed. 105; Oates v. National Bank, 100 U. S. 239, 247, 25 L. Ed. 580. This is also the rule in the greater number of the States and in England. See cases collectd in 7 Cyc. 932; 4 Am. & Eng. Enc. Law (2d Ed.) 290; and 1 Am. & Eng. Ann. Cas., p. 275, note. And recently the Supreme Court of Arkansas in Exchange Nat. Bank v. Coe, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, recognizing that the trend of modern decisions is in favor of the rule adopted in the federal courts as tending to promote uniformity in the several jurisdictions, has expressly adopted this rule and overruled dicta to the contrary in two earlier Arkansas cases.

And while it was formerly held by the Court of Appeals of Ken-

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tucky in Lee's Adm'r v. Smead, 1 Metc. (Ky.) 628, 71 Am. Dec. 494, that the taker of collateral for an antecedent debt without a new consideration did not become a holder for value in due course, not only is such holding on a question of general commercial law not binding on the federal courts (Swift v. Tyson, 16 Pet. 1, 15, 10 L. Ed. 865; Railroad Co. v. National Bank, 102 U. S. 14, 23, 26 L. Ed. 61), but the former law of Kentucky in this respect was changed by the enactment, in 1904, of a uniform Negotiable Instruments Act (Kentucky Acts 1904, c. 102, p. 213, Carroll's Kentucky Statutes 1909, § 3720b [Russell's St. §§ 1885, 1886]), which provides as follows:

Sec. 25. "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes a value, and is deemed such whether the instrument is payable on demand or at a future time."

Sec. 26. "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

It is clear that under these sections of the act one who takes a note before maturity as collateral security for a pre-existing debt is a holder for value. In re Hoppner-Morgan Co. (D. C.), 154 Fed. 249, 253; Trust Co. v. Markee (C. C.), 179 Fed. 764. And in recent cases in States in which the federal rule had not been previously followed, it is now recognized that by reason of the adoption of uniform negotiable instruments acts similar to that adopted in Kentucky, the assignee of a negotiable instrument taking the same before maturity as collateral security for a pre-existing debt is now to be regarded as a holder for value to the extent of the debt secured. Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822; Payne v. Zell, 98 Va. 294, 297, 36 S. E. 379. And see Bank v. Johnston, 105 Tenn. 521, 530, 59 S. W. 131.

It is also well settled that a bona fide holder of a negotiable instrument who, for a valuable consideration, without notice of facts which impeach its validity between antecedent parties, takes it by indorsement made before its maturity, holds the title unaffected by these facts and may recover thereon, although as between the antecedent parties the transaction may be without legal validity. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Goodman v. Simonds, supra, 20 How. at page 367, 50 L. Ed. 934; Railroad Co. v. National Bank, supra, 102 U. S. at page 23, 26 L. Ed. 61; Hamilton v. Fowler (C. C. A. 6), 99 Fed. 18, 22, 40 C. C. A. 47; First National Bank v. Moore (C. C. A. 9), 148 Fed. 953, 78 C. C. A. 581.

And the Kentucky Negotiable Instruments Act, supra, provides to the same effect, as follows:

Sec. 52. "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Sec. 57. "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to

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prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Furthermore, the pledgee of a note held as collateral being a bona fide holder for value, may maintain an action at law thereon in his own name. See McCarty v. Roots, supra; Railroad Co. v. National Bank, supra. And section 51 of the Kentucky Negotiable Instruments Act, supra, specifically provides that:

"The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument."

The fact that the name of the bank at which the note was payable was changed after execution from the Peoples' Bank to First National Bank, without the knowledge or consent of the defendants, does not, in our opinion, constitute a defense to the note. It is true that where no place of payment is designated in the note the subsequent insertion of a place of payment is a material alteration as against all parties not consenting thereto (2 Daniel Negot. Inst. [3d Ed.] § 1378; Whiteside v. Northern Bank of Kentucky, 10 Bush [Ky.] 501, 19 Am. Rep. 74), and that a change in the place of payment contained in a note as originally executed is a material alteration (Mitchell v. Reed, 106 S. W. 833, 32 Ky. Law Rep. 683). However, we cannot regard the change made in this case as amounting either to a change in the place of payment or the insertion of a place of payment where none had been originally specified. Under the note as originally written the place of payment was the Peoples' Bank of Sebree. This bank, as was known to most, if not all, of the makers, was a State bank, which had gone out of business as a State bank under that name about two years before, and had become the First National Bank of Sebree, which continued to do business as a national bank with the same officers, directors and stockholders as the former Peoples' Bank, and did business in the same banking house, with the old name of Peoples' Bank carved on its step. We are of opinion that, under these circumstances, the designation of the place of payment as the Peoples' Bank was equivalent to a designation of the First National Bank as the place of payment, and that it must have been so intended by all the signers of the note; that, under the circumstances, even if the name had not been changed the note would have still been payable at the banking house of the First National Bank, the former place of business of the Peoples' Bank, and that as the change in the place of payment merely served to give a more technically accurate description of the same place of payment it cannot be held to be a material alteration. Thus in Metropolitan Bank v. Claggett, 141 U. S. 520, 527, 12 Sup. Ct. 60, 35 L. Ed. 841, it was held that the conversion of a State bank in New York to a national bank did not destroy its identity or corporate existence; that it simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction; that it remained one and the same bank and went on doing business uninterruptedly; and that it was not thereby discharged from its liability as a national bank on its outstanding circulation issued in accordance with the State law.

The fact that the name of the payee was blank at the time the note was signed by the defendants and delivered to Scudamore does not

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impeach its validity in the hands of the plaintiff. An implied authority was thereby given to Scudamore to fill in the name of the payee, and even if he filled it in with the wrong name, in violation of his agreement with the defendants (as to which there is no evidence in the record) this would not affect the title of the plaintiff, taking the note as holder for value before maturity, without notice. See, by analogy, in the case of filling in a blank date, Goodman v. Simonds, supra, 20 How. at page 361, 50 L. Ed. 934, and Androscoggin Bank v. Kimball, 10 Cush. (Mass.) 373, and other cases there cited as to the general authority given to fill up blanks, by signing and delivering to an agent of an instrument in which blanks are left.

The fact that Scudamore's name appears both as a maker and payee on the note does not destroy its validity as a negotiable instrument.

It is true that in Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 S. W. 675, 20 Ky. Law Rep. 773, it was held that the assignment of a note of two obligors to a firm of which one of them was a member operated to extinguish the debt as to the obligor who thus became both obligor and obligee, and hence released the other obligor from liability on the note; and that in Deavenport v. Deposit Bank, 138 Ky. 352, 128 S. W. 88, 137 Am. St. Rep. 386, it was held that where a firm note comes into the hands of an individual member by assignment this does not pass title but operates as an extinguishment of the note itself, although he may in such case enforce contribution by the other members of the firm.

However, section 8 of the Kentucy Negotiable Instruments Act, supra, specifically provides that a negotiable instrument may be drawn payable to the order of a payee who is its drawer or maker. Under this express provision of the act, the character of the note in suit as a negotiable instrument, and its validity as between the plaintiff and defendants is not affected by the fact that Scudamore, the payee, is also one of the makers.

We are furthermore of opinion that the filing of the last "Amended Petition" did not, as is earnestly insisted in behalf of the defendants, serve as an abandonment of the original cause of action, in which the plaintiff sought to recover as the legal holder of the note, and as a substitution of a merely equitable claim for recovery based upon the theory of subrogation through the misapplication by Scudamore of its funds to the payment of his obligation to the American National Bank for the security of which this note was held as collateral. While this pleading is inartificially framed and is improperly styled an amended petition instead of an amendment, to the petition, yet, considering it as a whole, we are of opinion that it was not intended to set up the facts upon which the doctrine of subrogation could be based as a substitute for the original cause of action, but to state merely an additional or alternative cause of action resting upon the theory of subrogation. While we might have had some doubt on this question as an original proposition, we think it clear from the entire record that the pleadings were thus construed by all parties in the court below, and that neither that court nor any of the parties treated the case in the court below as resting solely upon the doctrine of subrogation, but on the contrary treated it as based primarily on the right of the plaintiff to recover as pledgee of the note in question. This was obviously the theory upon which the peremptory instruc-

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tions were given by the court in the plaintiff's favor, as is clearly shown by the opinion filed by the court on the motion for new trial. Furthermore the objection which the defendant now seeks to raise that under this last "Amended Petition" the sole cause of action presented is one of an equitable nature based upon the doctrine of subrogation does not appear to have been made in the court below or in any manner called to the attention of the court. This objection does not appear among the grounds assigned for a new trial; nor does it specifically appear among any of the thirty-two grounds of error assigned in this court. On the other hand the plaintiff has in this court expressly disclaimed any right of recovery on the theory of subrogation, and rests its case solely upon its right as pledgee of the note. Therefore in this state of the record and without any assignment of error specifically raising this question, we deem it unnecessary to consider the question whether if the plaintiff was seeking a recovery upon the theory of subrogation any right so founded could be maintained in an action at law; but without consideration of this question rest our judgment upon the fact that under a fair construction of the pleadings and upon the theory upon which this case was evidently treated in the court below, it is to be considered in its first and essential aspect as an action at law based upon the plaintiff's legal title to the note obtained through indorsement and delivery by Scudamore. See Third Nat. Bank v. Nat. Bank (C. C. A. 5), 86 Fed. 852, 30 C. C. A. 436; Louisville & N. Ry. Co. v. Womack, 173 Fed. 753, 97 C. C. A. 559, and Chicago R. I. & P. R. Co. v. Barrett, 190 Fed. 118, this day decided by this court.

On the whole, therefore, we conclude that under the pleadings and proof, there was material evidence, not inconsistent with any undisputed evidence in the case, to support the action of the trial court in overruling the defendants' motion for peremptory instruction and in directing a verdict in plaintiff's favor, and therefore without determining whether the defendants would, but for their exception to the action of the trial court in overruling their motion be in a position, under the doctrine of Rodriguez v. United States, 198 U. S. 156, 165, 25 Sup. Ct. 617, 49 L. Ed. 994, to now question by assignment of error the direction of the verdict against them, conclude that, upon the merits, the several assignments of error relating to these matters should be overruled.

Second. There is also an assignment of error that the court below erred in refusing to allow the defendants "to show that they, nor any of them, ever received any consideration for the note sued on, and in refusing to allow them to prove, which they offered to do, that they never received any consideration for said note and in refusing to allow them to prove the exact transaction."

The briefs filed in this court in behalf of the defendants do not identify the evidence there alleged to have been offered and excluded, by reference either to the names of the witnesses or pages of the record, although rule 24 of this court requires that the brief for the plaintiff in error shall contain a "brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point (150 Fed. xciii, 79 C. C. A. xciii). However, on examining the record we find that the defendant, J. B. Ramsey,

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was asked various questions evidently relating to this matter, to which objections by the plaintiff were sustained, and exception reserved by the defendants, and that counsel for the defendants thereupon "avowed that if the witness had been permitted to answer, he would have stated that they received no part of the consideration of said notes; that the notes were executed to raise money to purchase land in Florida; that Scudamore said he would take the notes, and negotiate them and get the money on them at a bank in Nashville, Tennessee; and that he wrote them back that he had failed to get the money, and that he had destroyed the notes, and that they would have to get money from other people, and that they did, and paid for the land, and received no part of the consideration for those notes."

Upon consideration of this avowal we are of opinion that no error appears in the exclusion of the testimony for two reasons: 1st, the defendants did not allege in their answer that the plaintiff had taken the note in suit with notice of the alleged want of consideration; and 2d, the defendants did not otherwise show or offer to show by this avowal that the plaintiff had notice of the alleged want of consideration at the time it received the note as pledgee. This, however, was clearly essential to constitute a defense upon the note, and obviously even if the fact of notice was provable under the pleadings, the fact that Scudamore had knowledge of the alleged want of consideration would not be chargeable to the plaintiff even although he was its cashier at the time, since, in the matter of pledging these notes to the plaintiff he was not acting in its behalf but was dealing at arm's length with the plaintiff and acting solely in his own interest. American Nat. Bank v. Miller, supra, 185 Fed. at page 343. The case here presented is obviously entirely different from that in Childers v. Billiter, 144 Ky. 53, 137 S. W. 795, in which the person who made the purchase of the note with knowledge of its infirmity was acting as the agent of the purchaser in the transaction.

Third. There are also numerous assignments of error relating to the action of the trial court in the admission of testimony. So far as the same require consideration they relate entirely to the admission of the evidence in reference to the change of the Peoples' Bank to the First National Bank, and the knowledge of that fact and of the attending circumstances which was possessed by the defendants at the time they signed the note in suit. This evidence related, in our opinion, to a matter which was obviously material under the issues in the case and was correctly admitted by the trial court. The assignments of error relating to this matter are without merit.

Fourth. Without stating in detail various other assignments of error, many of which are repetitions in various forms of the assignments of error already considered, or subdivisions thereof, it is sufficient to say that on a careful examination we find that they present no material questions which are not embraced in the consideration given to the assignments of error heretofore mentioned.

We find no prejudicial error in the record; and the judgment of the Circuit Court will accordingly be affirmed.

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Decision No. 1450.

STATE BANK OF GREENTOWN v. LAWRENCE. (No. 22090.)

(Supreme Court of Indiana. January 3, 1912.)

96 N. E. 947.

BILLS AND NOTES — BONA FIDE PURCHASERS.

Where a note given for an illegal consideration was purchased by plaintiff before maturity, it was enforceable on proof that plaintiff was an innocent holder.

Persons dealing in commercial paper are bound to use reasonable diligence to ascertain the nature of the transaction in which the notes were given, if the circumstances under which the paper is offered for sale are calculated to excite suspicion of a reasonably cautious person.

Where the circumstances surrounding the transfer of a note show that the purchaser has refrained from making inquiries lest he become acquainted with the transaction out of which the note originated, which would have shown illegality of consideration, the purchaser is not a bona fide holder.

Evidence held to warrant a finding that plaintiff bank when it purchased a note sued on possessed sufficient knowledge concerning the payee to place it under legal duty to make inquiry concerning the legality of the consideration, and, having failed to make such inquiry, could not recover on the note which was in fact based on an illegal consideration.

Appeal from Circuit Court, Huntington County; J. T. Alexander, Special Judge.

Action by the State Bank of Greentown against Charles Lawrence. Judgment for defendant, and plaintiff appeals. Affirmed.

Transferred from Appellate Court under Acts 1901, c. 259 (Burns' Ann. St. 1908,] 1405).

John Q. Cline and Claude Cline, for appellant. Watkins & Butler and Blacklidge, Wolf & Barnes, for appellee.

MORRIS, C. J. Suit by appellant on note for $120 executed by appellee on September 12, 1905, to W. A. Magee, due one year after date, payable at a bank of Hammond, and indorsed by Magee, and delivered to appellant, before maturity. Several paragraphs of answer were filed, among which was one alleging that the note was procured by fraud, and another that the sole consideration of the note was medical services, rendered by Magee, who, at the time, had no license to practice medicine. There was a trial by jury resulting in a verdict and judgment for defendant. Appellant filed a motion for a new trial, in which 142 causes therefor were alleged. This motion was overruled, and this action of the lower court is the only error assigned here.

Appellee claims that the verdict is fully sustained by undisputed evidence, and that the judgment should be affirmed, regardless of intervening errors, if any. The uncontroverted facts are that for some years prior to September, 1905, the payee of the note, "Doctor" W. A. Magee, was a resident of Chicago, Ill., and claimed to be a medical and surgical specialist. He had no license to practice in Indiana. He carried on an extensive system of swindling operations in a num-

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$250.

Washington, June 9, 1911.

Sixty days after date we promise to pay to the order of F. E. Edwards Trustee

Nine hundred fifty Dollars

at Federal National Bank

Value received with Interest

No. Due

Miller & Youngs

A note payable to a trustee or an executor is a non-negotiable instrument and the purchaser takes it subject to the offsets and defenses of the maker and third parties.

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ber of counties in Northern Indiana. His scheme was somewhat similar to the Bohemian oats swindle, which was used extensively in this State some years ago. The "doctor" plan was to call on people in the country who were in ill health, and assure them he could cure them in a definite time, the patient to execute him a note, due at the end of such time, for the treatment, and he to execute a written agreement to return the note when due if no cure were effected. He then sold the note before maturity. When the note in issue was executed, Magee was driven to appellee's farm residence in Jefferson township, in Huntington county. Appellee was lying on a couch. Magee told him he was from Chicago, and was a specialist, with a capital of $175,000; that he was out on a vacation, advertising his business, and he had heard appellee was ill. He examined appellee, and told him he had catarrh and kidney trouble, and was in a very dangerous condition, and would soon be beyond relief; that he could cure appellee in one year. Appellee's wife was present, and the "doctor" found her also in great need of his treatment. For $120 he agreed to visit appellee and wife once per month for a year, and furnish them medicine to take and insure a cure. As a result of his solicitation, appellee executed this note, and Magee gave appellee a written agreement signed by himself, by the terms of which the note was to be returned to him in case appellee and his wife were not cured within the year. They never saw the doctor again. He sent them medicine which they took for some time. Each time they took it, however, it made them worse. Finally, after about eight months, they quit taking Magee's medicine, called in a local physician who prescribed for them, and their ailments readily yielded to his treatment. Shortly after the note was executed Magee sold and indorsed it to appellant for $108.

When the note was executed, the practice of medicine, without a license, was prohibited in this State, under penalty of fine. Burns' Stat. 1908, § 8410. Consequently the note in the hands of Magee was not enforceable, because the consideration therefor was an illegal one.

The bank purchased the note before maturity for value. The note was not void. In the hands of an innocent holder it was enforceable. Schmueckle v. Waters, 125 Ind. 265, 268, 25 N. E. 281. Appellee claims that, if it be conceded that appellant had no actual notice of the note's infirmity, the uncontroverted evidence discloses such facts as legally put appellant on inquiry into its consideration, and, if inquiry had been made, appellant could not have failed to discover the illegality of the consideration and fraud in its procurement.

The law is well settled in this State that persons dealing in commercial paper are required to use reasonable diligence where the paper is offered for sale under circumstances that are calculated to excite the suspicion of a reasonably cautious person. Citizens' Bank v. Leonhart, 126 Ind. 206, 25 N. E. 1099; Giberson v. Jolly, 120 Ind. 301, 22 N. E. 306.

Where the circumstances show that the purchaser refrained from making inquiry lest he should thereby become acquainted with the transaction, out of which the note originated, he cannot occupy the position of a holder in good faith without notice. Schmueckle v. Waters, supra; Shirk v. Noible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; Coffin v. Anderson, 4 Blackf. 408.

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In Bank v. Bennett, 8 Ind. App. 679, 36 N. E. 551, that court said of the above doctrine: "The rule thus laid down we regard as an extremely equitable and salutary one. No man should be permitted to willfully close his eyes, and then excuse himself upon the ground that he did not see." When the illegality of the consideration of the note was shown, the burden devolved on appellant to show the purchase was made in good faith, without notice. Schmueckle v. Waters, supra.

It is shown by the evidence that appellant bank was located in Greentown, Howard county; that it was organized in 1903, and was the successor of the Commercial Bank, a private institution, which did business in the same building since 1896. In the latter year Frank R. Hill became cashier of the old bank, and continued as such until the reorganization in 1903, since which time he has been appellant's cashier. Dr. S. T. Murray was president of appellant bank since its incorporation. Both Murray and Hill were directors. In this case the note was offered for sale to the cashier, who consulted the president about it. After consulting, these officers investigated appellee's solvency through the auditor of Huntington county and the Bank of Warren, in the same county. The president and cashier then purchased the note for the bank . No inquiry was made except as above stated. The bank frequently purchased commercial paper, and the purchases were always made by Hill and Murray. At the trial, which occurred in 1908, Dr. Murray testified that, before he became president of the bank, he was, for many years, practicing medicine in Greentown and vicinity, and was a member of the Howard County Medical Association. "Dr." Magee was not a member of the society. About six years ago, the witness heard through his patients that Dr. Magee, a traveling specialist from Chicago, was practicing in that vicinity, and since that time Magee has made frequent visits there, did not become acquainted with him personally until after he became president of the bank, when he was introduced to him by the bank's bookkeeper at the bank as "Dr. Magee." Witness knew Magee as a Chicago specialist, and did not know that he had any other profession or business in that vicinity.

Hill, the cashier, testified, in substance, as follows: "About six or eight years ago Dr. Magee had a note which, I think, was purchased by the Commercial Bank. In this note the name of Magee, as payee, was printed, and there was also printed therein 'The Commercial Bank of Greentown' as the place of payment. I told him that we would not allow anybody like that to use our name in a blank. He got it printed without our consent. The above note had a perforated edge, but I did not suspect that a contract might have been torn off where the edge was perforated, and made no inquiry. This note was signed by one Runyan. The Commercial Bank had two of the Magee notes signed by a Mrs. Burns, and I think also by her son. Mrs. Burns has been dead three or four year. The son did tell me his mother had been swindled by Magee, but this conversation I think was after the Lawrence note was purchased. We had for collection a Magee note on Frank Kilander for $60. Settled it for $30 or $35; authorized to do so by Magee. I proposed the compromise because I did not regard Kilander as entirely solvent. I had no recollection that Kilander told me that Magee had swindled him. We

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collected a good many Magee notes. We bought a number of his notes, and sent them to other banks for collection. I thought Magee was an eye specialist. In 1903 or 1904 . . . he always carried a case like that. He told me if I had any trouble with my eyes or anything, . . . needed an operation or anything like that, he would make me a price. And he exhibited his case, and I told him my eyes didn't need anything like that at all. Magee came to the bank frequently before and after 1903. He occasionally loafed, without invitation, in the space inclosed in the bank by the railing. He was at my residence three or four times as a visitor. Once he was a guest there at supper. He was greatly interested in my little boy. At one time, about when the note in issue was purchased, a loan of $200 was made to Magee by the bank, and he assigned several notes as collateral for the loan, aggregating $800 or $900 in face value. These notes were in various amounts ranging from $40 to $75, and were executed by various persons, some of whom lived in Grant, Huntington, and Wells counties. Some of these notes were good, others bad. The bank employed a collector to collect them, and told him to get what he could on them. The bank had authority to compromise them, and got enough on them to pay the $200 note. Don't recollect when the note in issue was purchased, but think in September, 1905; knew that some of the notes handled by the bank were given 'for spectacles and fitting their eyes.' I have known people to pay as high as $120 for having their eyes treated and spectacles fitted; though the notes handled were given, some for having spectacles fitted and others for treatment of the eyes and fitting also."

The officers of the bank knew, or believed, that Magee was a Chicago specialist, and that he was offering to treat eyes and perform operations thereon, and that some of the notes handled by the bank were given for the treatment of eyes. They knew he called himself a doctor. The treatment of the eyes, either by medicine or by surgical operation, is prohibited by our statute, unless the physician or surgeon is licensed. Burns' Stat. 1908, §§ 8401, 8405, 8409, 8410. Section 8408 prescribes under what contingencies a physician or surgeon licensed in another State may practice here. The evidence does not disclose any fact that would have warranted Magee in practicing in Huntington county, even if he had a license to practice in Chicago. The note in suit shows on its face that appellee's post office address was in Huntington county.

The evidence introduced by appellee showed that Magee had no license to practice in Huntington county, and that he was a resident of Chicago, Ill. This was sufficient to prove prima facie the allegation that Magee was unlicensed. Melville v. State, 173 Ind. 352, 89 N. E. 490, 90 N. E. 467; Witty v. State, 173 Ind. 404, 90 N. E. 627, 25 L. R. A. (N. S.) 1297. There was not evidence tending in any way to show that Magee had a license to practice medicine and surgery anywhere. Burns' Stat. 1908, § 700, provides that no judgment shall be reversed where it appears that the merits of the cause have been fairly tried and determined in the court below. We think that the statute is applicable here. Whatever, if any, errors were committed by the trial court, could not have affected the verdict. Appellant, under the facts disclosed by the evidence of its president and cashier, who bought the note, was, in the exercise of ordinary care, under the legal duty to

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inquire into the consideration of the note. No inquiry was made. Such inquiry would have resulted in disclosing the illegality of the consideration.

Judgment affirmed.

Decision No. 1451.

BALSAM v. MUTUAL ALLIANCE TRUST CO.

(Supreme Court, Appellate Term. December 22, 1911.)

132 N. Y. Supp. 325.

BILLS AND NOTES — CHECKS.

The payee of a check cannot sue the drawee for nonpayment before acceptance or certification, under Negotiable Instruments Law, § 325.

If a check was paid by being credited in the book of the indorsee and marked "paid," the payee was thereby relieved of liability as indorser; the indorsee's remedy for the refusal of the bank to permit the credit to stand being against the bank.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Joseph Balsam against the Mutual Alliance Trust Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before GIEGERICH, LEHMAN, and PENDLETON, JJ.

Mortimer W. Solomon (Harry A. Gordon, of counsel), for appellant.

William Rabinowich, for respondent.

GIEGERICH, J. Plaintiff alleges that on a day named the firm of Wachtel Bros. drew and delivered to him a check upon the defendant for the sum of $200, which he indorsed to the order of a third person, who presented it for payment, which was refused, although the drawers had funds on deposit with the defendant more than sufficient to meet the check.

The payee of a check has no cause of action against the drawee for nonpayment thereof before acceptance or certification (Neg. Insts. Law [Consol. Laws 1909, c. 38] § 325; Duncan v. Berlin, 60 N. Y. 151; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55); and, in the present case, acceptance or certification was neither pleaded nor proved.

It appeared upon the trial that the check was deposited by the indorsee at one of the branch offices of the defendant institution, and was credited in her pass book and marked "Paid." It was further shown that the check was afterwards returned to the depositor, on the ground that there were not funds to meet it, and that she took up the check and gave her own check to the defendant for the same amount in its place. The plaintiff seems to argue that the check was, in effect, paid when it was received by the defendant at one of its branches, credited in the pass book of the depositor, and marked

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"Paid." This may be so (Iron Clad Mfg. Co. v. Sackin, 59 Misc. Rep. 281, 110 N. Y. Supp. 161), and the trial seems to have been conducted on that theory, in spite of the pleadings. But, assuming this position to be sound, it is clear that, when the check was paid, the plaintiff was absolved from all liability as indorser upon the check, and could not properly have had anything further to do with it.

If the check was paid, and the defendant nevertheless afterwards refused to allow the credit to stand in the depositor's account, the controversy was one between the depositor and the defendant. The depositor could doubtless have assigned her claim against the defendant, not upon the check, for that had been paid, but for the balance of her account. If any such assignment to the plaintiff had been pleaded or proved, it might be necessary to determine whether or not the depositor had lost her right to recover by voluntary taking up the check after payment and giving her own check in its place. As the record does not present this question, and as the plaintiff has no right of action against the defendant upon the check on any theory, the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event. All concur.

Decision No. 1452.

GILBERT v. ADAMS.

(Supreme Court, Appellate Division, First Department. November 17, 1911.)

131 N. Y. Supp. 787.

BILLS AND NOTES.

An instrument which acknowledges an indebtedness from the maker to a person named, and which promises to pay a specified sum to such person, "and in the event of my (maker's) death, I hereby authorize and direct the payment of the same out of the funds of my estate," is a promissory note payable on demand, within Negotiable Instruments Law, §§ 26, 29, declaring that an instrument is payable on demand when no time for payment is expressed, etc.; the quoted clause being surplusage.

Appeal from Trial Term, New York County.

Action by Marguerite Gilbert against Isabella V. Adams. From a judgment entered on a dismissal of the complaint, plaintiff appeals. Reversed, and new trial ordered.

See, also, 129 N. Y. Supp. 1123.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Clifford C. Roberts, for appellant.

Charles W. Zaring, for respondent.

CLARKE, J. The complaint alleges: "That heretofore, and at the borough of Manhattan, city of New York, on or about the

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23d day of January, 1907, the defendant, for value, made, executed, and delivered to the plaintiff her certain written instrument, or promissory note, of which the following is a copy, viz.: 'I, Isabella V. Adams, hereby acknowledge my indebtedness to Marguerite Gilbert, for services rendered by her, for which I promise to pay her the sum of thirty thousand dollars; and in the event of my death I hereby authorize and direct the payment of the same out of the funds of my estate. Dated. Jan. 23, 1907. [Signed] Isabella V. Adams.' That, although duly demanded from the defendant, no part of the same has been paid, and there is due and owing on the said instrument or promissory note the whole amount thereof, with interest from May 19, 1908."

The record shows that a jury was impaneled, and then proceeds:

"The defendant, the maker of the note sued on, was present at the trial. The court proceeded to take the evidence of the respective parties. After each side had rested, the following motion was made: 'Mr. Zaring: I move to dismiss the complaint upon the ground that it appears on the face of this instrument that it was not payable until after death. The court: Then you mean on the ground that the facts stated in the complaint do not constitute a cause of action? . . . I have given some thought to the construction of this instrument, and I am impelled to the conclusion that it is not a demand note. My conclusion is based entirely upon the terms of the note itself without reference to the testimony taken,'" and dismissed the complaint.

From the judgment entered thereon this appeal is taken; the record disclosing none of the evidence.

In Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487, Peckham, J., said:

"A written statement that a certain amount of money is due a payee therein named, followed by the signature of the maker of the statement, implies that the money is due from the maker, and is an indebtedness from him to the person to whom the money is thus acknowledged to be due. Kimball v. Huntington, 10 Wend. 675 [25 Am. Dec. 590]. The acknowledgment of the indebtedness, and that it is due, implies a promise to pay it on demand. It is a promissory note within the statute."

In that case the instrument directed the maker's executors to pay a specified sum one year after her death. The court proceeded:

"The time when the money is to be payable is, however, altered by the direction given to her executor to pay it one year from her death. If there were no limitation, an acknowledgment that the debt was due would imply that it was payable at once or on demand. The direction is, however, in the nature of a promise and expresses a time of payment, and therefore excludes the presumption that it is payable immediately, which would otherwise arise from the use of the word 'due.' Being a promissory note, it imports a consideration."

In Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424, the instrument sued on was as follows:

"Thirty days after death I promise to pay to Cornelius Carnwright $1,500 with interest."

Plaintiff gave no evidence of the transaction out of which the instrument arose, and none of the actual consideration thereof, but, having offered testimony tending to prove the genuineness of the maker's

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signature, put the note in evidence, and rested his case. After citing the statute in regard to promissory notes and a number of cases, Brown, J., said:

"No authority is cited in the courts of this State or of England holding that a nonnegotiable note is not within the terms of the law cited, and we are of the opinion that the language of our statute includes a note payable to a person without words of negotiability. The instrument sued upon being, therefore, a promissory note within the statute of this State, it follows that it imports a consideration. . . . A promissory note is defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to the bearer, a certain sum of money at a specified time or on demand. Story on Prom. Notes, § 1; Coolidge v. Ruggles, 15 Mass. 387."

The Negotiable Instruments Law (chapter 38, Consol. Laws 1909; chapter 43, Laws 1909) provides:

"Sec. 26. An instrument is payable on demand; . . . (2) in which no time for payment is expressed."

"Sec. 29. The instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof."

I am of the opinion that the instrument at bar is a promissory note, payable upon demand; that the words, "and in the event of my death I hereby authorize and direct the payment of the same out of the funds of my estate," are surplusage, and in no degree affect the preceding statement, "I promise to pay her the sum of thirty thousand dollars," and therefore the time of payment was not postponed until the death of the maker of the note.

The paper, while a promissory note, was nonnegotiable. This suit is between the maker and the payee, and all the defenses are available.

The dismissal of the complaint solely upon the ground stated was error and the judgment should be reversed and a new trial ordered, with costs and disbursements to the appellant to abide the event. All concur.

Decision No. 1453.

SOUTHERN RY. CO. v. STROZIER & WATERS. (3212.)

(Court of Appeals of Georgia. December 19, 1911).

73 S. E. 42.

CARRIERS — BILL OF LADING.

Where a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft, as the case may be.

While the general rule is that where one orders goods to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the carrier is a delivery to the purchaser, the carrier being the agent of the purchaser to receive them, and when this is done the title passes from the vendor to the vendee, this general rule, however, is subject to exception. If for any reason the seller,

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at the time of the shipment and delivery of the goods to the common carrier, takes a bill of lading to his own order, and attaches thereto a draft for the purchase money, he thereby expresses his intention to retain the title until the draft is paid, or accepted, and secured; and, where this method of shipment is adopted, the carrier becomes the agent of the seller or consignor, and would be authorized to deliver the goods only on a surrender to it of the bill of lading.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Strozier & Waters against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Strozier & Waters sued the Southern Railway Company in trover in the City Court of Savannah to recover bed lounges shipped by the Johnson Manufacturing Company at Fayetteville, N. C., to its own order at Savannah, Ga., with direction to notify Strozier & Waters. The facts are not in dispute, and, briefly stated, are as follows: Strozier & Waters gave an order for seven lounges, aggregating in price the sum of forty-seven dollars, to a salesman of the Johnson Manufacturing Company on February 17, 1910, the terms to be sixty days from March 1st. On receipt of this order the Johnson Manufacturing Company wrote to Strozier & Waters, requesting a deposit of ten dollars on account, and this deposit was made. Finding that Strozier & Waters had no commercial rating, the Johnson Manufacturing Company made a shipment of the seven lounges at Fayetteville, N. C., to itself at Savannah, with order to notify Strozier & Waters, attached a bill of lading to a sight draft drawn on Strozier & Waters, and placed it in the bank for collection. Strozier & Waters were then duly notified of the method of shipment and were requested to pay the draft. They refused to pay the draft, and the railroad company refused to deliver possession of the goods to them, unless the bill of lading was surrendered, and upon this refusal Strozier & Waters instituted proceedings in trover, claiming title to the shipment. The case is before us on exceptions to the refusal of the court to grant a nonsuit, and also to the final judgment rendered in favor of the plaintiff. The questions raised by the record are as follows: (1) Can an action in trover be sustained without showing either title, prior possession, or the right of possession? (2) Where a vendor makes a shipment by means of a common carrier, to his own order, with directions to notify a third person at destination, and the bill of lading is attached to a sight draft for collection drawn on such third person, does any title pass to such third person until payment is made of the draft, or rightful possession of the bill of lading obtained? (3) Where a shipment is made to the order of the consignor, with direction to notify a third person, and a sight draft is deposited for collection, is not the carrier justified in refusing to deliver until presentation of the bill of lading; and can a recovery as for a conversion be had against the carrier for a refusal to deliver until presentation of the bill of lading under these facts?

E. H. Abrahams and Osborne & Lawrence, for plaintiff in error. A. L. Alexander and Alexander R. Lawson, for defendant in error.

HILL, C. J. (after stating the facts as above). It is well settled that to support a recovery in an action of trover the plaintiff must

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show either title in himself, prior possession, or right of possession. Mitchell v. Georgia & Alabama R., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622. In this case the plaintiffs rely upon title to the shipment in question. They contend that the payment of the deposit of ten dollars and the delivery of the goods to the carrier operated to fix this title in them; that the contract of sale was fully executed and was not in any sense executory; and that the railroad company held possession of the goods as their agent and not as the agent of the consignor.

Unquestionably it is a general rule that delivery to the carrier of goods purchased is delivery to the consignee; but this general rule may be varied by a manifest exception thereto made by the vendor at the time of shipment. At the time of shipment in this case the Johnson Manufacturing Company expressly reserved title to the shipment by taking a bill of lading to its order and attached a sight draft to the same for collection.

Section 4234 of the Civil Code (1910) in such case expressly provides that no title passes until the drawee pays the draft thus drawn upon him. "When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be." When the Johnson Manufacturing Company consigned the shipment to itself, with order to "notify Strozier & Waters," this was equivalent to a positive statement that it did not intend to part either with the title to the shipment or the possession thereof until this draft was paid.

The case of Erwin v. Harris, 87 Ga. 335, 13 S. E. 513, seems to us controlling on this point. In that case a sale of oats was offered by a party in Texas to the vendee in Georgia. The vendee replied, offering to take five car loads f. o. b. at a Texas point, and the offer was accepted. The vendor shipped the oats, sending a draft for collection, with the bill of lading attached, and the vendee claimed title. The court ruled as follows: "The general rule is that when one orders goods from a distant place to be shipped by a common carrier, and the order is accepted and the goods shipped, a delivery to the common carrier is a delivery to the purchaser, the common carrier being the agent of the purchaser to receive them; and, when this is done, the title, without more, passes from the vendor to the vendee." Now note the exception: "If, however, the vendor of the goods is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain the title in himself, he may vary this rule, when he makes the consignment and delivers the goods to the carrier, by taking a bill of lading from the carrier to his own order. When the vendor does this, it is evidence that he does not part with the title of the goods shipped, but retains the same until the draft which he sends with the bill of lading is accepted or paid; and, when the title is thus reserved in the vendor or consignor, the carrier is his agent and not the agent of the consignee, and the risk is the consignor's and not the consignee's. Erwin, the consignor, having taken the bill of lading to his own order and attached it to the draft drawn on Harris, and sent them to the bank in Macon, Ga., delivery to the carrier in Texas was not a delivery to Harris. Under these facts, the title remained in Erwin, the consignor, and the delivery to Harris was contemplated

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to be at his residence in Macon; payment of the price to be made by him there on delivery." See also to the same effect, F. C. & P. Railroad Co. v. Berry, 116 Ga. 19, 42 S. E. 371, and the decision of this court in Moss & Co. v. Sell, 8 Ga. App. 588, 70 S. E. 18. In the case decided by this court, referring to the conduct of the consignor in the method of shipment, it is said that "the seller thereby expresses his intention not to part with the title to the goods shipped to the buyer until his draft attached to the bill of lading is accepted and paid." The facts in the case sub judice are almost identical with the facts in the case of Erwin v. Harris, supra; the only difference being the payment of the ten dollars deposit by Strozier & Waters as required by the Johnson Manufacturing Company. This payment of ten dollars was simply a payment on account, and to this extent it gave to the purchasers an interest in the shipment, but it did not fix the title to the shipment in them in the face of the express declaration on the part of the consignors, as shown by their method of shipment, that the title to the shipment was reserved until the purchase price was fully paid by the consignees. Here the vendors were not satisfied of the solvency of the vendees. They found that the vendees had no commercial rating, and therefore the vendors exercised their right to protect themselves by consigning the shipment to themselves in Savannah and attaching a draft to the bill of lading. In the case of Mathewson v. Belmont Flouring Mills Co., 76 Ga. 359, it was distinctly held that, where goods were shipped with sight draft and bill of lading attached, the return of the draft accepted or paid was a condition precedent to fix the title, and until this was done no title passed.

We might rest the decision of the case here, since by the authorities cited applicable to the facts, which are not in dispute, the plaintiffs in the court below not only failed to show any title in themselves to the shipment, but expressly showed that the vendor, Johnson Manufacturing Company, had reserved title in itself until the draft was paid. The carrier had knowledge of the method of shipment. It had the absolute right to refuse to deliver the shipment, made, as it was, without a surrender of its bill of lading. If it had delivered the shipment to the consignees without the bill of lading, it would have been in law liable to the vendors for any consequent loss, for the carrier is bound to see that it delivers a shipment only to the proper person designated by the consignor. Where a bill of lading covering a shipment has been issued, the carrier may demand its production as a condition precedent to making delivery. Atlantic & Birmingham Ry. Co. v. Spires, 1 Ga. App. 22, 57 S. E. 973; Sellers v. Savannah, Florida & Western Ry. Co., 123 Ga. 386, 51 S. E. 398. It follows from the foregoing that a refusal by the railroad company to deliver the shipment to the consignees, under the facts as stated, did not amount to a conversion by the carrier, but that the carrier in refusing to deliver, without a surrender of its negotiable bill of lading, was standing squarely upon its rights.

We conclude, therefore, that the trial court erred in not awarding a nonsuit, and that the judgment against the defendant was unauthorized.

Judgment reversed.

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Decision No. 1454.

HILL v. ADAMS EXPRESS CO.

(Court of Errors and Appeals of New Jersey. November 20, 1911.)

81 Atl. 859.

CARRIERS — LIMITATION OF LIABILITY — BILL OF LADING.

Where a common carrier undertakes to transport merchandise, the presumption is that he does it subject to the common-law liability, and this presumption remains until it is overcome by proof of a special agreement.

The burden of showing an agreement, limiting the common-law liability of a carrier, rests upon the carrier.

The mere acceptance by a shipper, without objection, of a receipt or bill of lading tendered by the common carrier that contains a stipulation importing a limitation of the carrier's responsibility, based upon an assumed valuation of the goods that does not correspond with their real value, is not conclusive evidence of the shipper's assent to such limitation.

Where the shipper accepted in silence from an express company a shipping receipt containing an express limitation of the company's liability to fifty dollars, and it appeared that the shipper did not assent to such a limitation, and did not know that the receipt contained such a limitation, held, that the trial judge, sitting as a jury, was justified in concluding, as matter of fact, that the limitation to fifty dollars was not a part of the contract between the parties.

Error to Supreme Court.

Action by Frank Hill, to the use of Mary A. Ferris, against the Adams Express Company. Judgment for plaintiff was affirmed on certiorari (80 N. J. Law 604, 77 Atl. 1073), and defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error. Joseph Beck Tyler, for defendant in error.

PITNEY, Ch. The Supreme Court on certiorari affirmed a judgment rendered by the District Court in favor of the plaintiff, a shipper of goods, and against the defendant express company, for the value of certain merchandise shipped, which was lost by fire without the fault of the express company; the Trial Court having overruled defendant's contention that its liability was limited by certain stipulations contained in the express receipt or bill of lading, delivered by the company to the agent of the shipper at the time it accepted the goods, which stipulations were as follows: "The company's charge is based upon the value of the property, which must be declared by the shipper. . . . In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars, unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

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The case was tried in the District Court without a jury, and the court's findings of fact are fully set forth in the opinion delivered by Mr. Justice Parker in the Supreme Court. These findings are fairly sustained by the evidence, and are therefore conclusive upon this review.

At the trial defendant's counsel requested the court, among other things, to specifically find that the limitation of liability to fifty dollars was taken by defendant's employee from an invoice handed to him by the shipper or his agent. The court refused this request, and, on the contrary, found "that neither Frank Hill nor Mary Ferris, nor any other person by their authority and with their knowledge, furnished an invoice to the defendant company; nor did they authorize any one else to do so; nor did they have any knowledge that any one else had done so at the time the shipment was made." This finding fairly deals with the defendant's request by negativing it specifically, and we agree with the contention of counsel for the defendant in error that the evidence would support the inference that the supposed invoice, if such there was, had been prepared by the employees of the express company, and not by the shipper or his agent.

There was, however, undisputed evidence that Barnett, the driver of the wagon upon which the goods in question were conveyed to the express company for shipment, and who acted as agent of the plaintiff in respect of the shipment, accepted in silence from the agent of the express company a shipping receipt containing, as already mentioned, an express limitation of the company's liability to fifty dollars.

In view of this evidence, defendant's counsel further requested the trial judge to limit the recovery accordingly. The refusal of this request raises the question that has several times been mooted in this court, but upon which it has not until now been necessary for us to pass, viz., whether the mere acceptance by the shipper, without objection, of a receipt or bill of lading tendered by the carrier that contains a stipulation importing a limitation of the carrier's responsibility, based upon an assumed or conventional valuation of the goods that does not agree with their real value, conclusively imports the assent of the shipper to such limitations of responsibility.

It should be mentioned that, as we read the state of the case, the trial judge in effect found as a fact that Barnett, the driver, had authority from the plaintiff to agree with the defendant respecting the terms of shipment, and rested his judgment in favor of the plaintiff upon the fact that neither Barnett nor his employer assented to the limitation of defendant's responsibility to fifty dollars. Therefore the question of law respecting the driver's agency, upon which the Supreme Court on one occasion rested its decision in this case (Hill v. Adams Express Co., 77 N. J. Law, 19, 71 Atl. 683), is not presented as the record now stands.

When the case came to this court upon review of the decision just referred to, we disposed of it on the ground that, since in receiving the box the defendant company dealt with Hill as the shipper, and since there was nothing to show that he or Barnett, the driver, was ignorant of the fact that the bill of lading contained provisions limiting the defendant's liability to fifty dollars, it was to be presumed that they were informed of its contents and assented to the limitation. Hill v. Adams Express Co., 78 N. J. Law 333, 74 Atl. 674. The pre-

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sumption referred to was, of course, a presumption of fact, rebuttable like other presumptions of that nature.

Upon the trial now under review, this presumption has been successfully rebutted; and in line with our former decision we hold that, since there was no assent by the plaintiff Hill, or by Barnett through whom he acted, to the limitation of the value of the goods, nor knowledge that the express company's receipt contained a contract limiting the liability of the company, the limitation is not binding upon the plaintiff.

It is unnecessary for us at this time to review the authorities in other jurisdictions. They are fully cited in the cyclopaedias. 5 Am. & Eng. Encyc. Law (2d ed.) 288–294; 6 Cyc. 404, 406. So far as they declare or decide that a shipper who accepts a receipt or bill of lading is conclusively presumed, in the absence of fraud, to have thereby assented to all the terms of the instrument, although he may have been unaware that the document contained any limitation of the carrier's common-law liability, and did not in fact assent thereto, we are not in accord with them. We give, as we think, all legitimate weight to the inference that arises out of the shipper's conduct, when he accepts in silence and without objection a paper tendered by the carrier, by holding, as we do, that acceptance of the paper, without objection, raises a presumption that the shipper knew of and assented to the stipulations contained in it; a presumption which, like other presumptions of fact, is subject to be rebutted.

In transactions of this sort, as in other matters, the assent of both parties is required in order to make a contract. More than fifty years ago our Supreme Court declared that: "Where a common carrier undertakes to transport an article in his line of business, the legal presumption is that he does it subject to the common-law liability, and this presumption remains until it is overcome by positive proof of a special agreement." Pennsylvania R. R. Co. v. N. J. R. R. Co., 27 N. J. Law 100. For authority the court relied upon a decision of the Supreme Court of the United States: N. J. Steam Navigation Co. v. Merchants' Bank, 6 How. 377, 383, 12 L. Ed. 465. The doctrine thus announced entered into the reasoning of this court in Russell v. Erie R. R. Co., 70 N. J. Law 808, 811, 59 Atl. 150, 152 (67 L. R. A. 433), and Judge Vroom, in delivering the opinion of the court, declared: "The burden of proof of showing such a limitation of liability is on the defendant company, and being in derogation of common right is to be construed most strongly against the carrier. 5 Am. & Eng. Encyc. Law (2d ed.) 336; Ashmore v. Penna. Steam Towing & Transp. Co. [28 N. J. Law] 190; Hooper v. Wells Fargo & Co., 27 Cal. 11 [85 Am. Dec. 211]. No presumptions will be indulged in favor of exemptions from common-law liability."

The doctrine referred to was the ground of the decision rendered by the Supreme Court, in Hayes v. Adams Express Co., 73 N. J. Law 105, 62 Atl. 284, where the case in 27 N. J. Law was cited, and the doctrine was not at all disapproved by this court on review. 74 N. J. Law 537, 65 Atl. 1044. On the contrary, our decision there proceeded on the ground that the shipper's knowledge of a customary practice on the part of the carrier to base its charges upon the declared value of the merchandise did not of itself alone import the shipper's assent to a limitation of liability in the particular case.

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In Atkinson v. New York Transfer Co., 76 N. J. Law 608, 71 Atl. 278, we held that if the shipper knew that the rate charged for the transportation of a trunk was based upon a valuation of $100, and that the receipt tendered to her contained a stipulation limiting the carrier's liability to the amount thus stated, the acceptance of the receipt in silence estopped the shipper from afterwards asserting the value to be greater. Our decision was based upon the actual knowledge and assent of the shipper.

Finally, in our former disposition of the present case (78 N. J. Law 333, 74 Atl. 674), we relied upon clear, and at that time uncontradicted, evidence of assent by the shipper to a modification of the common-law liability proposed by the carrier.

It would be inconsistent with this long line of decisions, and also, as we think, inconsistent with the reason of the matter, to hold that the mere receipt by the shipper of a paper containing limitations of the common-law liability of the carrier conclusively imports the shipper's assent to such limitations. We hold, on the contrary, that the facts found by the trial judge, that neither Hill nor the driver in fact assented to the limitation of liability to fifty dollars, nor knew that the express receipt or bill of lading tendered by the company contained such a limitation, warranted his conclusion that the limitation was not a part of the contract between the parties.

The decisions of the Supreme Court, in Saunders v. Adams Express Co., 76 N. J. Law 228, 69 Atl. 206, and in Florman v. Dodd & Childs Express Co., 79 N. J. Law 63, 74 Atl. 446, so far (if at all) as they may be inconsistent with the result we have reached in the present case, must be considered as overruled.

The judgment under review should be affirmed.

Decision No. 1455.

GRIFFIN v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. November 1, 1911.)

72 S. E. 463.

CARRIERS.

Where goods are accepted for shipment, whether intended to be immediate or remote, the placing of the goods upon its platform renders a carrier responsible for any damages thereto from fire originating within its right of way, unless released from liability by the shipper.

A carrier's rule that it assumed no risk for cotton placed upon its platform unless tendered for immediate shipment may be waived, and where it accepts cotton intended for shipment at some future time, the cotton will be upon its platform with the carrier's "consent." under Civ. Code (S. C.) 1902, § 2135, making a carrier responsible for loss by fire originating on its right of way, except for property which has been placed upon its right of way illegally or without its consent.

In an action against a carrier for the loss of cotton destroyed by fire while on defendant's platform, the question whether it had been placed there by defendant's consent as cotton tendered for immediate shipment, notwithstanding a rule that the

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carrier assumed no risk for cotton put upon its platform, unless tendered for immediate shipment, held for the jury.

Appeal from Common Pleas Circuit Court of Sumter County; George E. Prince, Judge.

"To be officially reported."

Action by T. N. Griffin against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mark Reynolds and Lucian W. McLemore, for appellant. Thos. G. McLeod, for respondent.

JONES, C. J. This action was for the recovery of damages for the destruction by fire of certain cotton belonging to plaintiff, while upon the platform of the defendant company within the limits of its right of way. There was evidence to the effect that notice had been given to the plaintiff that the defendant assumed no risk for cotton so placed, unless same was tendered for immediate shipment, but that such cotton would be entirely at the owner's risk. The evidence also showed that the cotton in question was placed upon such platform, subsequently to the giving of such notice and without any tender thereof for immediate shipment, and was subsequently destroyed by fire originating within the limits of defendant's right of way. There was also testimony which is claimed by plaintiff as tending to show that, notwithstanding such notice, the cotton in question was placed upon said platform "with the consent" of the defendant, within the meaning of section 2135 of the Civil Code.

At the conclusion of the entire testimony in the case, the defendant moved for a direction of a verdict in its favor, upon the ground that the evidence admitted of no other inference but that the cotton was placed upon the defendant's platform, either without its consent, or if with its consent, then upon the understanding between the parties that it was so placed at the entire risk of the plaintiff himself. This motion was refused by the presiding judge, it being held by him that, while the evidence showed that the cotton was so placed upon the platform after such notice given by the defendant, there was still testimony to go to the jury upon the question of waiver by the defendant of the terms and requirements of such notice. The appeal questions the correctness of this refusal to direct a verdict in favor of the defendant. Substantially the question presented for determination is whether there was evidence to go to the jury upon the issue as to the defendant's consent to placing of the cotton upon the platform as cotton intended for shipment.

If the cotton was accepted for shipment, whether such shipment was intended to be immediate or remote, the placing of the same upon the platform would render the defendant responsible for any damage thereto from any fire originating within the right of way, unless the plaintiff had released the defendant from such liability. The defendant could waive its own rule that it would not accept cotton upon its platform or right of way unless intended for immediate shipment, and could, notwithstanding its rule, accept the same intended for shipment, not immediately, but at some future time, in which case the cotton would clearly be upon the right of way with the consent of the

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defendant, within the meaning of the word "consent" as used in the statute. Yarborough v. Railway, 78 S. C. 103, 58 S. E. 936. It is not questioned that the fire originated within the right of way of the defendant company, and that defendant would be responsible for the damage to the cotton, if the same had been placed on the platform for immediate shipment; and the case just cited shows that the defendant would be liable for such damage, if the cotton was accepted for shipment, though such shipment was not intended to be immediate, notwithstanding its stipulation by notice that it would not accept cotton, unless for immediate shipment. The notice given in this case was substantially the same as that which was shown in the case of Yarborough v. Railway, 78 S. C. 103, 58 S. E. 936. In that case the notice was in substance to the effect that the railroad company would not be responsible for cotton placed on the platform until the same was "tendered to and accepted by the company for shipment." In the case at bar the notice was to the effect that the defendant would not be responsible for cotton placed on its platform until the cotton "is placed for immediate shipment."

There was testimony tending to show that, subsequent to the service of the notice already mentioned, plaintiff's agent was informed by the same agent of the defendant through whom such notice had been given that the same was not intended to apply to plaintiff; and there was also testimony to the effect that, after plaintiff had been procuring, in compliance with such notice, the issuance by defendant of bills of lading for small lots of cotton at brief intervals, he or his agent was informed by defendant's agent that bills of lading need not be procured for contemplated shipments until the entire shipment was ready; such testimony tending to show the resumption of a previously existing course of dealing between the parties by which cotton was placed for shipment upon defendant's platform in small lots from day to day, and bills of lading thereof were issued from time to time when any lot was completed for shipment. The evidence of the plaintiff's agent was that the defendant's agent instructed his to "go ahead and complete the lots in a reasonable time," and that this instruction was given with reference to the matter of the lot of cotton intended for shipment, and had relation to the time when bills of lading should be procured for the same; and there was testimony tending to show that this instruction was given to save the necessity for issuing daily bills of lading for small lots of cotton. There was also testimony from which the inference might be drawn that the cotton here in question, and which was destroyed by fire while upon the defendant's platform, was so intended for ultimate shipment, and was so placed in pursuance of the instructions of defendant's agent.

The judgment of the Circuit Court is therefore affirmed.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit.

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Decision No. 1456.

DOSBAUGH NAT. BANK v. JELF.

(Supreme Court of Kansas. December 9, 1911.)

119 Pac. 538.

SALES — CHATTEL MORTGAGES.

Under the facts stated in the opinion, it is held that the sale of a span of mules was a sale for cash; that delivery of the mules was conditioned upon payment of a check upon a bank, given for the price; and that an oral chattel mortgage, given by the purchaser to the bank which furnished the money to meet the check, was valid, and, as a purchase-money mortgage, was superior to exemption rights claimed by the widow of the mortgagor.

Appeal from District Court, Chautauqua County.

Action by the Dosbaugh National Bank against Pearl Jelf. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Sproul and J. A. Ferrell, for appellant. Jackson & Noble, for appellee.

BURCH, J. The action in the District Court was one of replevin for a span of mules. The plaintiff claimed under an oral chattel mortgage, given by W. T. Jelf to secure the payment of money advanced by the bank to enable Jelf to purchase the mules. The defendant, the widow of Jelf, claimed under the statute setting off the property to her as exempt, upon his decease. Judgment was rendered for the plaintiff, and the defendant appeals.

The transaction between Jelf and Hamil, the seller of the mules, is related by Hamil as follows: "He came up there to buy a span of mules from me, and we talked on the price and finally agreed; and he said if he could have until the 1st of March he would take them, and I told him I was selling him the mules worth the money, and I wanted the money; and he said he did not have the money, and would have to make arrangements for it. And he came back in a day or two, and said that he could get the money down at Dosbaugh's, but that he had not made any arrangements, but that he would give me a check, if I would keep it for a day or two, and make arrangements, and I told him it would be all right. And when he went to give me a check he said that he did not have any check book, but that he would leave it at the house for me, and when I went down there he had assigned over one check for $3.50, and that was on Grenola, and one for $324, on the Dosbaugh bank."

The first conversation with Hamil occurred about April 1st. Jelf took the mules away with him at the conclusion of the second conversation.

The conversation between Jelf and the bank is related by its cashier as follows: "Mr. Jelf said that he had bought a team of mules, and wanted to borrow the money to pay for them. He said that he would give us a mortgage on the mules to secure the money; that about March 1st he would have some money coming to him from his farm,

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which he was selling; and that he could pay the note then. I told him that we would not want to go to the trouble of writing and recording a chattel mortgage for so short a time; that we were willing to loan him the money, and would let him give us the note for the amount until March 1st, until which time we would consider the mules ours — consider the mules ours until paid for. He said: 'All right, and if you want a chattel mortgage on them at any time I will give it.' Whereupon I drew up a note for $325, which he signed, and which we discounted, taking out the interest from February 6th until March 1st, and passed the proceeds to his credit." Jelf's check was presented and paid a few days after his note was given.

The sale by Hamil was a sale for cash, and not a sale on time. The delivery of the mules was clearly conditioned upon the payment of the price by means of the check, and if the check had not been paid Hamil could have reclaimed possession of the property. Bank v. Brown, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824, and authorities reviewed in the opinion.

Jelf had no money to pay the price, except the Grenola check of $3.50, until he borrowed it of the plaintiff, and at the time he borrowed it he gave the oral mortgage on the mules to secure payment. The mortgage was therefore a purchase-money mortgage, by means of which Jelf obtained title. That the mortgage ran to a third person does not change its character as a purchase-money mortgage. The consent of the defendant was not essential to its validity, and, there being no instant of time when her husband was the unqualified owner of the property, no exemption rights attached. Beach v. Fireovid, 84 Kan. 357, 360, 114 Pac. 206; Boggs v. Kelly, 76 Kan. 9, 11, 90 Pac. 765, 15 L. R. A. (N. S.) 461. Although oral, the mortgage was valid between the parties (Bank v. Taylor, 69 Kan. 28, 76 Pac. 425, and cases cited in the opinion), and the recording act (Gen. Stat, 1909, § 5224) has no application, because the defendant is neither a purchaser nor a creditor. The defendant took title, subject to the rights of the plaintiff, and the judgment of the District Court is affirmed. All the justices concurring.

Decision No. 1457.

HALL & BROWN WOOD WORKING MACH. CO. v. HALEY FURNITURE & MFG. CO. et al.

(Supreme Court of Alabama. November 23, 1911.)

56 So. 726.

CHATTEL MORTGAGES — PRINCIPAL AND AGENT — CORPORATIONS.

Even at law, a tender of the debt by the mortgagor after the law day, but before seizure of or demand for the chattels, revests legal title in him.

Knowledge acquired by an agent before the existence of his agency, or as to matters outside the line of his duty as agent, is not notice thereof to his principal; it being necessary, in order to bind the latter, that such knowledge be acquired in transacting the business of the principal.

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Knowledge acquired by the agent in transacting the business of his principal is constructive notice to the principal, regardless of his actual knowledge; the agent being identified with the principal in law.

The rule charging a principal with notice of facts coming to the agent's knowledge in discharging the agency is not one of evidence, but of substantive law, though actual knowledge of the principal is a fact of evidence, and hence it is immaterial that through self-interest it is apparent that the agent will not in fact communicate his knowledge to the principal.

It is an agent's duty to inform his principal of every material fact within his knowledge upon the subject of his agency, which may affect the principal's interests, and it will be presumed that he has done so, but such presumption may be rebutted by showing that such information was not present in the agent's mind when executing the agency.

In detinue for machinery, in which a claim was interposed by a third party under a chattel mortgage, evidence that plaintiff had informed a stockholder and director of claimant, though before the claimant corporation was organized, that the title to the machinery was in the plaintiff, was admissible in evidence to show actual knowledge of plaintiff's claim by claimant corporation, making its exclusion prejudicial error to plaintiff.

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Detinue by the Hall & Brown Wood Working Machine Company against the Haley Furniture & Manufacturing Company and another, in which the Sheffield Trust Company intervened as claimant. From a judgment for claimant, plaintiff appeals. Reversed and remanded.

Emmett O'Neal and Kirk, Carmichael & Rather, for appellant. Almon & Andrews, for appellees.

SOMERVILLE, J. This is an action of detinue by the appellant against the Haley Furniture & Manufacturing Company, and W. T. Archer, assignee. The appellee duly intervened as claimant of the property sued for, filing his affidavit of claim, and the appropriate issue was made up, and the trial proceeded thereon. The affidavit did not state the nature of the right of the claimant as required by Code, § 6043.

The bill of exceptions sets out all the evidence, but we here state only such portions thereof as are necessary to illustrate the material questions which we are called upon to consider.

The subject-matter of the suit is a lot of machinery sold by the plaintiff to said Haley Company in February, 1906, and delivered in April following, except one item which reached the consignee as late as about June 12th. Only about one-third of the purchase money was to be paid on delivery, and to secure the payment of the balance the vendor retained the title and possessory right in itself until the price of the machinery was fully paid, as shown by the written contract and notes in evidence. This written contract was filed for record on August 3, 1906, and in the meantime, on June 18, 1906, the claimant Sheffield Company (now appellee) loaned to the defendant Haley Company $6,000, the latter executing to the former as security therefor a mortgage deed conveying certain property in the city of Sheffield described as "all of block numbered four hundred and forty-eight (448) together with all buildings and improvements thereon,

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and all machinery and appliances thereat, together with the appurtenances." It does not appear that this mortgage has ever been foreclosed.

The tendency of the testimony of the two witnesses, C. L. Haley and J. J. Challen, introduced by the plaintiff, was to show that in the loan transaction of June 18th, in which the Haley Company secured the loan of $6,000 from the Sheffield Trust Company, the Trust Company was represented by one J. W. Worthington, who was a director and stockholder, but not an officer, in said Trust Company; that said Worthington was at the same time president of the Sheffield National Bank; that said witnesses, who were respectively president and secretary and treasurer of the Haley Company, negotiated with said Worthington in the months of January, February, March, and April, 1906, for the purpose of getting a loan for the Haley Company; that Worthington promised to get such a loan for them, and stated that he would secure it from a trust company about to be organized; that during these negotiations in January and February it was explained to Worthington that the loan was to be used in the purchase of the machinery in controversy; that the contract of sale between the plaintiff and said Haley Company, one of the terms of which provided for the reservation of the title and right of possession until the purchase money was paid, was exhibited to Worthington and its terms gone over with him, and then left with him for several days for his inspection; that the Sheffield Trust Company was not organized and had no existence until May 26, 1906; and that no conversations with Worthington, nor information to him as to the status of the title to the machinery occurred on or after May 26, nor any later than March, 1906. For the claimant, all of the testimony as to information given him concerning plaintiff's claim to the machinery is vigorously denied by Worthington, as well as any knowledge whatever on his part of such a claim, either before or during his agency.

With respect to statutory claim suits, it has long been the settled law in Alabama that the affidavit and bond required of the claimant are jurisdictional, and cannot be dispensed with even by consent of parties, express or implied. Mobile Life Insurance Co. v. Teague, 78 Ala. 147; House v. West, 108 Ala. 355, 19 South. 913.

When the claim interposed is based on a mortgage or lien, the statute (section 6043, Code 1907) expressly requires that "the claimant must state in his affidavit the nature of the right which he claims," and the same section further requires that, in case the claim is sustained, the amount of it, whether due or not, must be ascertained, and the plaintiff may pay to the claimant the amount so ascertained, and of course eliminate him from any "further participation or interest in the proceedings."

From its very nature this requirement is not jurisdictional, but there can be no possible doubt that it is restrictive in its character and purpose, and that a claimant who fails to thus propound the nature of his claim cannot be allowed to support it by evidence of either mortgage or lien. This conclusion was announced by this court in the case of Ivey v. Coston, 134 Ala. 259, 32 South. 664, cited with approval in Bennett v. McKee, 144 Ala. 601, 38 South. 129.

The introduction in evidence of the mortgage in support of the claimant's claim was objected to on the ground of its irrelevancy to

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the issue, and, no foreclosure being shown, the objection should have been sustained. And it necessarily follows from this that the court should have given the general affirmative charge for the plaintiffs as requested.

It is a mistake to assume, as do counsel for appellee in their brief, that by "a claim based on a mortgage" the statute means only a mortgage not overdue. It cannot be thus restricted. On the contrary, the statute plainly applies to any mortgage under which there remains to the mortgagor the right of redemption; the intent being to give the plaintiff the benefit of such right if it has not been foreclosed. And, even in a court of law, a tender of the debt by the mortgagor after the law day, if made before seizure of or demand for the chattels, revests the legal title in the mortgagor. Maxwell v. Moore, 95 Ala. 166, 10 South. 444, 36 Am. St. Rep. 190.

The claimant's affidavit did not state the nature of his claim, and by the omission he renounced the right to prove any claim based upon a mortgage. The plaintiff met the omission in the only ways open to him, viz., by objection to the introduction of the mortgage, and by request for the affirmative charge. The record presents not merely a defect in the affidavit, but a variance between pleading and proof.

On motion of the claimant, the trial court excluded all the testimony of the two witnesses Haley and Challen as to conversations and transactions between them and J. W. Worthington relative to the property sued for, and relative to their negotiations with him for a loan from the claimant company; the ground of objection being, substantially, that any notice to Worthington of plaintiff's claim, before the organization of the claimant company, and hence before his agency for it began, was not notice to the claimant, nor binding on it. The question presented by this ruling is the vital question in the case.

By a long line of decisions, this court is thoroughly committed to the rule that knowledge acquired by an agent prior to his agency, or in regard to matters outside the line of his duty, or while pursuing his own or some other person's business, is not notice to his principal of such fact or facts, and is not binding upon him. Mundine v. Pitts, 14 Ala. 84; Pepper v. George, 51 Ala. 195; Reid v. Bank of Mobile, 70 Ala. 211; McCormick v. Joseph, 83 Ala. 403, 3 South. 796; Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; Goodbar v. Daniel, 88 Ala. 590, 7 South. 254, 16 Am. St. Rep. 76; Bessemer L. & I. Co. v. Jenkins, 111 Ala. 135, 149, 18 South. 565, 56 Am. St. Rep. 26; Central of Ga. Ry. Co. v. Joseph, 125 Ala. 313, 28 South. 35; Pearce v. Smith, 126 Ala. 116, 28 South. 37; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 South. 607, 90 Am. St. Rep. 932; Patterson v. Irvin, 142 Ala. 401, 38 South. 121; Traders' Ins. Co. v. Letcher, 143 Ala. 410, 39 South. 271.

The fundamental requirement is that such knowledge on the part of an agent to bind his principal "must be limited to such knowledge or information as comes to the agent in transacting the business of his principal." Central of Ga. Ry. Co. v. Joseph, 125 Ala. 319, 28 South. 37. This is a simple rule, easy of application, and just in its results.

Where the agent's knowledge is of this character, it is constructive notice to the principal entirely regardless of the principal's actual

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knowledge. Wiley v. Knight, 27 Ala. 346. This is usually explained by saying that the law conclusively presumes that the agent has in fact communicated his knowledge to his principal. We think, however, that the better and more logical explanation is that with respect to the given transaction the agent is in law identified with his principal; that knowledge that comes to the agent, while acting in such matter for his principal, would have come to the principal had he been acting for himself; and that, as a rule of policy and justice, he must be equally charged therewith. Sooy v. State, 41 N. J. Law 395; Houseman v. Girard Ass'n, 81 Pa. 256–262.

But on either theory, the rule is not a rule of evidence merely, as is sometimes declared, but a rule of substantive law.

The Alabama rule, as above defined, is not in accord with the weight of authority in other jurisdictions, as pointed out by Mr. Freeman in his valuable note to Trenton v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 228–233, where the cases on both sides are collected and discussed; and as shown by Mr. Pomeroy in his third edition of Equity Jurisprudence (volume 2, § 672, and notes). It appears from these authorities that the more generally accepted rule is that the agent's knowledge, though acquired previously to his agency, if retained by him and carried with him into the subsequent business which he transacts for his new principal, is notice to the latter whether communicated to him or not.

This rule we regard as both illogical and unjust — a criticism which is fully vindicated by a consideration of the numerous and unpractical qualifications and exceptions which courts expounding the rule have been compelled to adopt. In this connection we note Mr. Pomeroy's observation that "several of the ablest English judges have, in recent cases, expressed a decided opinion against the rule itself, and while considering themselves bound by it, as far as it is settled, have wished that it should be abrogated by the legislature." 2 Pom. Eq. Jur. (3d Ed.) § 672, note 1.

We adhere to the rule as settled by our own cases cited above.

There are statements in the opinion in the case of Lea v. I. B. Mercantile Co., 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, which we cannot reconcile with out view of the law as settled by our previous cases, and which require qualification. In that case it was held that, where the alleged agent was in fact the sole manager and controller of a corporation at his will, and its sole stockholder but one — the latter being a nonresident — where, in fact, he was not only the alter ego, but in effect the corporation itself, and where he acted in a single transaction for himself and the corporation, his knowledge acquired previous to his agency was notice to the corporation and binding upon it. As was well said, per Tyson, J.: "It could be nothing but the sheerest nonsense to say that as agent he should communicate the knowledge to himself as the managing representative of his corporation. Since the corporation could acquire notice in no other way than by and through its managing head or officer, it will scarcely be doubted that notice to such officer is of necessity notice to it." Herein is found the chief reason for the conclusion of the court, in which we fully concur.

But the opinion goes further and lays down the rule that the agent's previously acquired knowledge will be constructive notice to the

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principal, if recently acquired in a connected transaction, or if of such precise and definite character as that it must be presumed to remain present in his mind and memory during the last transaction. This rule, as there stated, is a quotation from 2 Pom. Eq. Jur. (3d Ed.) § 672, to which we have already referred. It is sought to be justified as a mere exception to the general rule conceded to exist in Alabama, and is declared to be in harmony therewith; and cases are cited as illustrative of and supporting this exceptional rule, viz., Wiley v. Knight, 27 Ala. 336, 346; City Nat. Bank v. Jeffries, 73 Ala. 183; White v. King, 53 Ala. 162; and Dunklin v. Harvey, 56 Ala. 177. It is sufficient to say of the first two of these cases that they merely lay down the general rule that notice to an agent, with respect to a matter as to which he is then serving as agent, is notice to the principal; such being unmistakably the fact in each case. It was said, it is true, in Wiley v. Knight, that "the principal knows whatever the agent knows"; but, taken literally and absolutely, this is a patent fallacy, and the court could only have meant to include knowledge acquired while and as agent.

In White v. King and Dunklin v. Harvey, though not expressly stated, it is to be inferred from the record that the knowledge of the agent which was held as constructive notice to his principal was acquired by the agent prior to his service as such. Both were chancery cases, and, on the pleadings and proof, the knowledge of the agent was properly if not necessarily imputed to his principal by implication, as we shall presently explain. But the theory of constructive notice was applied, inadvertently, we think, since the distinction as to the time of the agent's acquisition of the knowledge was not mooted, and was evidently not in the mind of the court, and no reference was made in White v. King to the earlier case of Mundine v. Pitts, 14 Ala. 84, 90, where the limitation is plainly declared; while in Harvey v. Dunklin the case of Mundine v. Pitts is actually cited as authority. Moreover, Judge Stone, who wrote the opinion in Harvey v. Dunklin, afterwards declared, in McCormick v. Joseph, 83 Ala. 403, 3 South. 797, that: "Notice or knowledge by an attorney, to carry home constructive notice to the client, must be shown to have been given or acquired after the relation of attorney and client was formed. It is not enough that the notice is first and the retainer afterwards."

It is clear, also, that the notion of a general and special rule consisting harmoniously in our decisions, as stated in Lea v. I. B. Mercantile Co., cannot be sustained, for the cases themselves expressly repudiate it. In Wheeler v. McGuire, 86 Ala. 406, 5 South. 193, 2 L. R. A. 808, it was said, per Clopton, J.: "Many cases hold that notice to an agent is notice to his principal, though acquired before the relation is created, if present in his mind at the time of the particular transaction, and he can communicate it or act upon it, without violating a legal (or) moral duty. It was, however, early settled in this State that knowledge of an agent, to operate as constructive notice to the principal, must have been acquired after the relation of principal and agent was formed. This rule having been followed ever since, whatever might be our opinion were it an open question, it would not be prudent to disturb it now. Mundine v. Pitts, 14 Ala. 84; McCormick v. Joseph, 83 Ala. 401, [3 South. 796]; Frenkel v. Hudson, 82 Ala. 158, [2 South. 758, 60 Am. Rep. 736]."

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And, again in Goodbar v. Daniel, 88 Ala. 590, 7 South. 257, 16 Am. St. Rep. 76, it was said, per H. M. Somerville, J.: "There are cases which hold to the doctrine that knowledge of a material fact acquired by an agent in a former transaction, comparatively recent in point of time, such as he is bound to communicate, if present in his mind and memory while engaged in a second transaction, shall operate as constructive notice to his principal in the second transaction. 2 Pom. Eq. Jur. (1st Ed.) § 672. But there is a long line of decisions in this State which adopt the rule that notice to an agent, to bind his principal, must have been acquired by the agent during his employment, i. e., while he is actually engaged in the prosecution of his duties as agent, and not at a time antecedent to the period of his agency" — citing a number of the cases.

The emphasis is unmistakable, for in Mundine v. Pitts the agent's knowledge was acquired only a few days beforehand; in McCormick v. Joseph only a week beforehand; and in C. of G. Ry. v. Joseph it was acquired only a few moments beforehand.

It will sufficiently appear from the foregoing review of our decisions that the new doctrine (to this State) found in Lea v. I. B. Mercantile Co., 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, founded on the text of Mr. Pomeroy and other authorities, is a departure from the established rule of our decisions, and must therefore be disapproved and rejected. It follows, also, that the cases of White v. King, 53 Ala. 162, and Dunklin v. Harvey, 56 Ala. 177, are erroneous in their application of the theory of constructive notice to the facts there involved, and must be qualified to that extent.

Constructive notice to the principal through the actual knowledge of the agent is not a rule of evidence, but one of substantive law. Given notice to or knowledge of the agent, received while so acting, and the principal is conclusively bound by it; not because he ever knows it in fact, because his actual knowledge is utterly immaterial, but because as to the thing the agent is doing the agent is in law the principal, and the principal is in law the agent. Their legal identity is complete. Nor can it matter, in this aspect of the rule, whether the agent has, or has not, private reasons or interests which make it unlikely or even certain that he will not inform his principal, as correctly ruled in First Nat. Bank v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80.

On the other hand, the actual knowledge of the principal, when material, may be proved like any other fact. It is the duty of an agent to inform his principal of every material fact within his knowledge, no matter when acquired, bearing upon the subject-matter of his agency, which may affect the interests of his principal with respect thereto; and it will be presumed that he has discharged this duty. The Distilled Spirits, 11 Wall. 367, 20 L. Ed. 167. Here we have a true rule of evidence — a presumption of law that a duty has been discharged, from which follows the further presumption that the principal has acquired the knowledge of his agent. But this presumption like others of a similar nature, is disputable, and not conclusive. Unless rebutted, it is sufficient to fasten upon the principal, not an unreal constructive notice which is incontestable, but simply an implied actual notice which is contestable. A failure to distinguish be-

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tween these entirely distinct principles has, in our judgment, produced most of the confusion and contrariety of judicial opinion which seems to have always attended the consideration of this subject by the courts. See the cases cited in 31 Cyc. 1594, note 50.

This doctrine of implied actual notice will serve to justify, if not to explain, the rulings found in White v. King and Dunklin v. Harvey, supra.

The rule of implied notice, as above stated, unless there is direct evidence showing that the imputed knowledge was present in the agent's mind during his agency, must obviously depend upon the anterior presumption of fact that the knowledge in question has thus persisted in his memory, so as to be available for communication seasonably to his principal.

The law does not presume that a fact once known is never forgotten, for this is contrary to all human experience. Nor is the remoteness or lateness of its acquisition as knowledge by the agent in all cases the most important consideration, for all experience teaches that much that we learned in the remote past ineradicably persists in our memories, while unimportant events of yesterday have been already forgotten. This particular issue then rests in inference, and is for the jury to determine.

If the jury find that the knowledge was present in the agent's mind during the execution of the agency, then they must find as matter of law that the principal was duly informed, unless they are reasonably satisfied to the contrary from other evidence before them. We do not mean to say that the agent's prior knowledge may not be so remote in point of time, or so lacking in clearness or apparent importance, as to justify the trial court in presuming, prima facie, that it has been forgotten. This seems to have been the view taken in Bessemer L. & I. Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26.

There is no testimony shown by the bill of exceptions which can support a finding that Worthington was the alter ego of the claimant corporation in such sense and degree as to bring this case within the influence of the decision in Lea v. I. B. Mercantile Co., supra.

The information acquired by Worthington from the witnesses Haley and Challen, being acquired prior to the period of his agency for claimant, did not operate as constructive notice to it.

But their testimony in this regard was admissible in evidence for the purpose of showing actual knowledge of plaintiff's claim on the part of the claimant corporation, under the principles above declared; and its exclusion was error prejudicial to appellant.

Other assignments of error need not be noticed, as the questions presented will hardly recur upon another trial.

Reversed and remanded. All of the Justices concur, except DOWDELL, C. J., not sitting.

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Decision No. 1458.

HULL et al. v. ANGUS et al.

(Supreme Court of Oregon. October 17, 1911.)

118 Pac. 284.

BILLS AND NOTES — DAMAGES — SPECIFIC PERFORMANCE.

A note which upon its face refers to a mortgage, to the terms and conditions of which it is subject, in effect makes the note and the mortgage one instrument.

Under L. O. L. (Ore.), § 5834, which provides that an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money, a note which upon its face states that it is given as a "part of the purchase price of real property, and is secured by mortgage of even date herewith, and is subject to all the terms and conditions of said mortgage," the mortgage referred to giving the maker of the note an option to pay it, or to have it canceled within one year, is not a negotiable instrument.

Under the express provision of L. O. L. (Ore.), § 5885, defining a "holder in due course," one who does not take a note in good faith, or for value, is not such a holder, and, as provided by L. O. L. (Ore.), § 5891, a note in the hands of such holder is subject to the same defenses as if it were non-negotiable.

For any inexcusable violation of a valid contract, the defaulting party, whether there be any express stipulation to that effect or not, must respond in damages to the extent of fairly compensating the other party for the injury suffered.

Where a contract is conditioned for the performance of a collateral agreement, the sum mentioned therein as accrued damages will be presumed to be a penalty; and it is incumbent upon the party desiring to recover the sum mentioned as liquidated damages to show that it was so intended by the parties.

When the actual damages in the case of a breach of a contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract, or the circumstances under which it was made, indicate a contrary intention, or it so manifestly exceeds the actual injury suffered as to be unconscionable.

Where parties are competent to contract, are equal masters of the situation, and deal at arm's length, a court of equity will not disturb the measure of damages established by them, unless it is so grossly unconscionable and oppressive as to shock the conscience of the court.

Defendant conveyed real property to the plaintiffs for the purchase price of $16,300, of which a part was paid in cash, and a remaining $7,500 paid by a note which stated that it was subject to all the terms and conditions of a mortgage of real property, which it was given to secure; the mortgage by its own terms, and by reference to the terms of a separate agreement, providing that the plaintiffs should furnish defendants a certain amount to be expended on the property within a year, and that on performance of such condition plaintiffs should have an option either to pay the note, or within a year to require defendant, upon prescribed notice, to repurchase the property for $24,000 cash within thirty days; and, as liquidated damages for the defendant's failure to repurchase, it was provided that the mortgage given by plaintiffs should, together with the debt secured thereby, become immediately void, and the defendant should thereupon cancel the note and release the mortgage of record. Held, that the provision for liquidated damages in the alternative. on defendant's failure to repurchase, was not so unconscionable as

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to prevent its enforcement in plaintiff's action for the cancellation of the note and mortgage.

Where vendor and purchaser have agreed that the purchaser might pay a purchase-money note secured by mortgage, or at his option within a year require the vendor to repurchase, or to cancel the note and the mortgage of record, on the vendor's refusal to either repurchase or cancel the mortgage, equity will decree specific performance of the agreement of the parties to remove a cloud upon the purchaser's title to the property.

In an action by the purchaser of land, who had paid for it in part by notes secured by mortgage thereon, and who under the express provisions of the note and the mortgage together had an option to pay the note, or to require the vendor, on "thirty days' notice in writing of their desire to sell under the terms of this agreement," to repurchase the land, a complaint which avers as to notice that a notice in writing was prepared, issued and signed by the purchasers, without averring that such notice was issued to the vendor, but only that it was issued, is bad on demurrer.

Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by William Hull and others against F. W. Angus and another. Judgment for plaintiffs on overruling a demurrer to the complaint, and defendants appeal Reversed.

The substance of the complaint in this suit is that, on November 21, 1907, the defendant Angus conveyed certain real property to the plaintiffs for the purchase price of $16,300. Of this $7,000 was paid in cash, and for $1,800 thereof the plaintiffs gave their note and mortgage securing the same, the validity of which is not now in dispute. For the remaining $7,500 they gave their note, in words and figures as follows: "$7,500.00. Portland, Oregon, Nov. 21, 1907. Ten years after date, I promise to pay to the order of F. W. Angus, seven thousand five hundred dollars, for value received, with interest from date, payable annually, at the rate of seven per cent. per annum until paid, principal and interest payable in U. S. gold coin at the First National Bank, Hood River, Oregon; and in case suit or action is instituted to collect this note, or any part thereof, I promise to pay such additional sum of money as the court may adjudge reasonable as attorneys' fees in said suit or action. This note is given as a part of the purchase price of real property and is secured by mortgage of even date herewith, and is subject to all the terms and conditions of said mortgage. This note may be paid at any interest paying date." For the purpose of securing this note, the plaintiffs gave their mortgage upon the real property, which by its terms was made junior to the mortgage for $1,800. The junior mortgage contains the following clause: "An agreement contemporaneous with this mortgage and note has been entered into between the mortgagors and the mortgagee, whereby it is provided that if the mortgagors shall, within one year from the date hereof, tender to the mortgagee a written option to purchase from the mortgagors herein the premises herein described, for the sum of twenty-four thousand dollars cash in hand, the mortgagors will accept the note hereby secured as a part of said cash payment to the amount of said note, principal, and interest accrued; but if the mortgagee shall fail to accept said option and complete the purchase

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of said premises from the mortgagors within thirty days after the expiration of one year from the date hereof, then as liquidated damages for the failure of the mortgagee to take up said option and purchase said property from the mortgagors, the note hereby secured shall become and be null and void, and shall forthwith be canceled and surrendered by the mortgagee to the mortgagors, and this mortgage shall at once be released of record by the mortgagee. Said agreement is hereby referred to and expressly made a condition of this mortgage." The agreement referred to was executed by the defendant Angus, as party of the first part, and the plaintiffs herein, as parties of the second part.

This agreement, after reciting the conveyance of the land and the execution of the two mortgages already mentioned, proceeds thus: "Whereas, first party has represented to said second parties that said premises will be worth the sum of $24,000.00 one year from the date of sale thereof to second parties, provided second parties shall expend the sum of $1,500.00 thereon in clearing same, under the supervision and direction of first party, without further cost or expense to second parties; said sum of fifteen hundred ($1,500.00) dollars to be paid by parties of the second part upon the completion of work; and whereas, second parties have relied upon such representations as true and a valuable consideration moving to them in said transaction above mentioned: Now, therefore, the party of the first part does hereby agree with the parties of the second part, that upon the performance of all the conditions imposed upon second parties by this agreement, he will purchase, or cause to be purchased from second parties, the above described lands at the agreed price of $24,000.00 cash in hand within thirty days from the expiration of one year from the date of sale of said premises to second parties, upon second parties giving first party thirty days' notice in writing of their desire to sell under the terms of this agreement; and in the event of first party making default in the payment to second parties of the agreed purchase price of $24,000.00 as above provided, then as liquidated damages for the failure of party of the first part to repurchase said premises from the parties of the second part as above provided, the mortgage given by parties of the second part to party of the first part to secure their promissory note for $7,500.00, shall, together with the debt secured thereby, become immediately null and void, and first party shall forthwith cancel said note and release said mortgage of record; and it is expressly understood and agreed that first party, in case of his default as above provided, shall accept said payment of $8,800.00 as the full purchase price of said premises. The mortgage of even date herewith for $7,500.00 together with the note secured thereby, given by second parties to first party to insure the payment of that portion of the unpaid purchase price of said premises, are hereby referred to and made conditional upon this agreement."

At the time of the execution of the note and mortgages, the defendant Angus addressed a letter to the plaintiff W. Hull, to the effect that the notice clause in the agreement mentioned shall be interpreted to mean that the notice mailed and registered to the defendant Angus, at Hood River, Ore., should fulfill the agreement on the part of the plaintiff as regards such notice. The conveyance and all the other writings mentioned were executed contemporaneously

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and as part of the same transaction, and the mortgage in question was duly recorded in the mortgage records of Wasco county. The plaintiff furnished to the defendant Angus the sum of $1,500 mentioned in the agreement, to be expended on the property under the direction of Angus, and he expended it under his own supervision as he deemed best and proper.

The allegation respecting notice to the defendant Angus is here quoted in full: "That, in pursuance of the terms and conditions of the agreement and the note and mortgage hereinbefore described and set forth, these plaintiffs did, on the 29th day of September, 1908, and again on the 21st day of October, 1908, cause notice in writing to be prepared, issued, and signed by these plaintiffs calling upon defendant F. W. Angus to purchase or cause to be purchased the said property from them, as provided in said written agreement and in said mortgage, within thirty (30) days after the 21st day of November, 1908, and offering on the part of them, the said plaintiffs, to perform and carry out all the obligations imposed upon them, the said plaintiffs, by the terms and conditions of said agreement and mortgage." It is alleged that Angus failed and refused to buy the property at $24,000. It is also claimed that Ferguson, pretending to own the $7,500 note, has commenced an action at law to collect $520 claimed to be due as interest. The complaint also alleges that Ferguson had notice of all the conditions contained in the note and mortgage, and if he bought at all he paid nothing for the same, but took with the fraudulent purpose of defeating plaintiffs in their rights to have the same canceled. The defendants are alleged to be insolvent. A general demurrer to the complaint was overruled. The defendants stood on their demurrer, the court entered a decree canceling the note and mortgage for $7,500, and the defendants appeal.

A. J. Derby and Ernest C. Smith, for appellants. Moulton & Scobey and E. C. Bronaugh, for respondents.

BURNETT, J. (after stating the facts as above). There are three questions presented by this record: First. Is the note in question negotiable, so as to prevent plaintiffs from urging its cancellation as against the defendant Ferguson; or, in other words, is his title to the note such as to render him immune against the attacks made upon that title by the complaint? Second. Do the stipulations for the surrender and cancellation of the note and mortgage in question, as set forth in those instruments and the accompanying contract, constitute an agreement for liquidated damages or for a penalty? Third. Is the allegation of the complaint about notice to the defendant Angus sufficient to charge him with knowledge of the purpose of plaintiffs to exercise their option to sell the land for $24,000? We will consider these questions in the order noted.

According to section 5834, L. O. L., an instrument to be negotiable must contain, among other things, an unconditional promise or order to pay a sum certain in money. The note in question bears upon its face a condition in these words: "This note is given as a part of the purchase price of real property and is secured by mortgage of even date herewith, and is subject to all the terms and conditions of said mortgage." It would be doing violence to the language to say that the note is unconditional, when it expressly says upon its face that it is subject to conditions. The reference to the mortgage by the

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terms of the note is in effect making the note and mortgage one instrument, with the conditions rendering the note non-negotiable. Bradstreet v. Rich, 74 Me. 303; In re Commissioners of Washington Park, 52 N. Y. 131; Casey v. Holmes, 10 Ala. 776. Taken in connection with the reference to its accompanying mortgage, making them in effect one instrument, as these authorities teach, the note amounts to a declaration by the makers that, although they have promised to pay, yet on the face of the note they reserve the option of either paying it, or within one year having it cancelled. The operation of this provision is wholly within the control of the makers, and amounts to a condition destroying the negotiability of the note. The case in hand is by this circumstance distinguished from the case of the United States National Bank v. Floss, 38 Ore. 68, 62 Pac. 751, 84 Am. St. Rep. 752, cited by appellant; for failure of consideration discussed there, as affecting the negotiability of the note, was not a matter within the control of the maker. In that case the note was fair and unconditional on its face. To be sure, interest was unpaid in part, but that was a mere incident of the principal debt, and was held not to amount to notice of dishonor. Although the consideration was an executory contract, yet there was no allegation that the holder knew of any breach of it at the time he purchased the note; hence the plaintiff in that case was a holder of the paper in due course. Here it is charged that, besides knowing all the conditions contained in the note and mortgage, the defendant Ferguson did not pay any valuable consideration for the note, and that it was assigned to him without consideration, and for the fraudulent purpose of preventing plaintiffs from exercising their right to have those instruments canceled.

In order to be a holder in due course of the note in question, the defendant Ferguson must come within the provisions of section 5885, L. O. L., as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The language of the note itself, referring and making it subordinate to the conditions of the mortgage, shows upon its face that it is not a regular negotiable instrument. In addition to that, according to the allegations of the complaint, Ferguson did not take the note in good faith or for value. He is therefore not a holder of the note in due course, and according to section 5891, L. O. L., a note in the hands of any holder, other than the holder in due course, is subject to the same defenses as if it were non-negotiable. It is not necessary to further elaborate this branch of the case, for in their brief defendants substantially admit that if plaintiffs have any right to demand cancellation of the instruments in question the right is equally available against both defendants. We conclude that, as against the defendant Ferguson, the note is subject and amenable to the attack made upon it by the complaint, and that as to him the demurrer was not well taken in that respect.

The question of whether the parties provided for liquidated dam-

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ages or for a penalty is next to be considered. For any inexcusable violation of a valid contract, the defaulting party must respond in damages to the extent of fairly compensating the other party for the injury he has suffered. This principle governs every contract, whether there be any express stipulation to that effect or not. By agreement of the parties, in proper cases, this principle may be enforced by a penalty or a stipulation for liquidated damages; but even these are not exclusive. The parties may provide for themselves some other lawful rule of action. In the case in hand, the parties have chosen not to provide for the payment of money as the compensation for a possible breach by the defendant Angus of his contract to repurchase the land at $24,000, or cause the same to be done. They have not fixed any sum of money as stipulated damages for such a breach of contract; neither have they left the damages to be assessed by a jury within the limits of a prescribed penal sum. They have provided that, in lieu of any money compensation for his refusal to perform the single stipulation to repurchase the land, he shall do the single act of cancelling the note for $7,500 and its securing mortgage. Really, in substance and reason, the defendant Angus by his contract engaegd to do one of two things in the alternative, at his option, in the performance of the contract on his part, viz., either to buy the land at $24,000, or to cancel the note and mortgage for $7,500. In Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762, the Supreme Court of the United States uses this language: "It is a well-settled rule of law that, if a party by his contract charges himself with an obligation possible to be performed he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him." The contract of Angus, as disclosed by the complaint, is one he had a right to make. He could, if he chose, lawfully agree to buy the land at $24,000, or any other greater or less amount. He could also lawfully agree to the alternative of cancellation and surrender of the note and mortgage. Neither of these stipulations is against public policy nor a violation of any public law. Except for fraud, accident, surprise, mistake, undue influence or some other such reason of equitable cognizance, courts of equity, the same as courts of law, will hold competent contracting parties to their engagements. We cannot refuse to enforce the contracts of the parties as they make them, albeit they are improvident, neither can we make a new contract for them, and substitute it for the old one.

The defendant Angus has not bound himself by the flexible cord of a penalty, entailing upon him only such actual damages as might be assessed by the verdict of a jury. He has agreed to the strict and immovable standard of liquidated damages according to the language of his contract. He has chosen to agree in the alternative either to buy the land or to cancel the note. Can he be relieved under any phase of equitable jurisdiction? The question of a fixed sum as liquidated damages came before this court most prominently in the early case of Wilhelm v. Eaves, 21 Ore. 194, 27 Pac. 1053, 14 L. R. A. 297. The contract in question there contains some sixteen different stipulations of varying degrees of importance, the damages for a breach of some of which would be easily ascertainable, while there were others not so clear as to the amount of damages applicable; but

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there was only one sum of money provided as an omnibus standard, by which to measure the damages of any one of those different stipulations, and the court held that, owing to the unconscionable effect, the parties could not be supposed to have intended that construction of their agreement, and so denied recovery of that specific sum of money as a compensation for the breach of the contract.

The next case where the question of liquidated damages came into prominent notice was that of Salem v. Anson, 40 Ore. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485. The defendant Anson had entered into a bond with the city of Salem to establish in that city an electric light plant in thirty days, or pay the city $5,000. He failed to establish the plant at all, and the city sued on his bond to recover the full sum mentioned. The court, by Justice Bean, in discussing the question now under consideration, laid down two rules which, though not necessarily controlling in all cases, are regarded as affording a general guide by which controversies relating thereto may be determined: (1) "Where the contract is conditioned for the performance of some collateral agreement, the sum mentioned therein will be presumed to be a penalty, and it is incumbent upon the party desiring to recover the sum named as liquidated damages to show that it was so intended by the contracting parties." The case in hand evidently does not come within this rule, because there is no collateral agreement. The engagements of the parties are in the alternative, and each is a part of the same agreement. Strictly speaking, one cannot be considered as a security for the performance of the other. The two are of equal dignity and force, and merely present two alternatives, the performance of either of which would be considered the performance of the entire contract on the part of the defendant. The second rule is thus stated in Salem v. Anson, supra: (2) "When the actual damages in case of a breach of the contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract shows, or the circumstances under which it was made indicate, a contrary intention of the parties, or it so manifestly exceeds the actual injury suffered as to be unconscionable." In the case of Sun Printing & Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, Justice White, speaking for that court, says: "The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract." The principle seems to be, from a consideration of all the authorities, that where the parties are competent to contract, are equally masters of the situation, and deal at arm's

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length, the court of equity will not disturb the measure of damages established by the parties themselves, unless it is so grossly unconscionable and oppressive as to shock the conscience of the court and lead it to believe that, although so nominated in the bond, in the letter, it is not included within the spirit of the contract, or within the contemplation of the parties. With this principle in mind, and as if this were purely a question of liquidated damages or penalty, let us examine the transaction more particularly, and determine whether the alternative is so unconscionable as to render it inequitable to enforce the agreement as made by the parties.

In the beginning, the plaintiffs paid cash in the sum of $7,000, gave their first mortgage, now undisputed, for $1,800 and the second note and mortgage, the instruments in question, for $7,500, making a total of $16,300. If the defendant Angus had performed his contract in repurchasing the property, by the terms of their agreement, the plaintiff would have received cash, $16,500, and the return of their note and mortgage for $7,500, making a total of $24,000. This arrangement would have canceled their note and mortgage for $7,500, reimbursed them for the $7,000 cash, and extinguished their first mortgage of $1,800, which would have left them at net balance of $7,700 in cash, over and above all their expenditures for the purchase price of the property. True it is that they placed $1,500 in the hands of the defendant to be expended at his discretion in improving the property, but this was not part of the purchase price, and was as much for his benefit as for the benefit of the plaintiff, because it improved the property in question. There is enough of the element of uncertainty on both sides of the contract to make the damages incapable of accurate ascertainment at the outset. On behalf of the plaintiff, they could not estimate how much, if any, the expenditure of $1,500 at the discretion of the defendant would enhance the value of the property. In the absence of observation on the part of the defendant, he could not foretell in advance whether the plaintiff could so manage the property as to pay the indebtedness attaching as a lien thereon. The whole transaction was more or less speculative, and the parties could not with any degree of accuracy foretell the measure of damages accruing to either by reason of a breach of their agreement. Hence it was competent for them to provide a rule of action in that respect by which their rights should be determined; and it is clearly within the proprieties of equity for them to agree in the alternative that the defendant should, as a solution of the dilemma, repurchase the property at $24,000, or cancel the $7,500 note and mortgage. The option in favor of the plaintiff, to call for the repurchase of the property or the cancellation of the note, was open from the beginning of the transaction until one year thereafter. As we have shown, if the option had been declared on the following day after the beginning of the transaction, the plaintiff would have received a net balance of $7,700 in cash. As time ran on and interest accrued, this might be perceptibly diminished, but this would not be sufficient to render the cancellation of the note and mortgage unconscionable as a measure of damages for the failure of the defendant to comply with either of the alternatives of his contract. The following precedents are illustrative of the questions involved: Dwinel v. Brown, 54 Me. 468; Calbeck v. Ford, 140 Mich. 48, 103 N. W. 516; Moore v. Durnam,

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63 N. J. Eq. 96, 51 Atl. 449; Witherspoon v. Duncan (Tex. Civ. App.) 131 S. W. 660; Ahlers v. Harrison, 131 Iowa 289, 108 N. W. 331; United States v. Bethlehem Steel Co., 205 U. S. 105, 118, 27 Sup. Ct. 450, 51 L. Ed. 731. The equity side of the court is the forum in which to determine the questions involved in this controversy, for the mortgage remaining unsatisfied of record, when of right it ought to be canceled, constitutes a cloud upon plaintiffs' title to the land; the reason being that, as against any one seeking to enforce it, the plaintiffs would be put to their allegation and proof of its invalidity to withstand the claim.

Cancellation of instruments void in fact, but apparently valid, is a peculiar province of equity jurisdiction. Breathwit v. Rogers, 32 Ark. 758; Hardy v. Brier, 91 Ind. 91; Gray v. Coan, 23 Iowa 344; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; Hoopes v. Devaughn, 43 W. Va. 447, 27 S. E. 251. If equity will enforce cancellation of an instrument constituting a cloud upon the title to real property, in the absence of an agreement for that purpose between the parties, within the scope of the cases last cited, all the more will it decree specific performance of the express engagements of parties to accomplish the same result. We conclude on the merits of the transaction that the bill presents no equities in favor of the defendant Angus sufficient to excuse him from doing as he agreed in the alternative. His codefendant, as we have already shown, stands in no better condition in that respect, for the note he claims is nonnegotiable, and by the allegations of the complaint he is not a holder in due course.

On the third question, about notice to the defendant Angus, we think the allegations of the bill are insufficient to put him in default. The plaintiffs might have caused notice in writing to be prepared, issued, and signed by themselves, all as alleged, and still the defendant might not know anything about the notice. We speak of issuing a summons, but it often appears that a defendant is not served, and knows nothing of any summons being issued. Full many a writ is issued, but never served, or otherwise brought to the notice of the defendant. The complaint does not say that the notice was issued to Angus, but only that it was issued. This is not sufficient to bring the election of the plaintiff to the knowledge of Angus, so as to charge him, or put him in default of execution of his contract. For this reason the court erred in overruling the demurrer to the complaint, and the decree must be reversed, with directions to the court below to proceed in a manner not inconsistent with this opinion.

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Decision No. 1459.

ALLEN v. HANCE, City Treasurer (HUBER, Intervener). (L. A. 2,687.)

(Supreme Court of California, October 13, 1911.)

118 Pac. 527.

ESTOPPEL.

An estoppel, whether resting in judgment, deed, contract, or in pais, means only that a man is forbidden to show the existence of a fact where, by his past conduct, declarations, agreement, deed, or judgment, it would work an injustice and an injury to his adversary to permit him to do so.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Mary W. Allen against C. H. Hance, Los Angeles City Treasurer, and Mrs. I. B. Huber, Intervener. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Morris, for appellant. Edward Judson Brown, for respondents.

HENSHAW, J. This action was brought by plaintiff against defendant, the treasurer of the city of Los Angeles, to restrain the sale of plaintiff's property in the foreclosure of a lien for certain street assessment work.

The city of Los Angeles had entered in to a contract with one Whittier for the performance of certain street work on Pasadena avenue. The specifications for the work contained the following clause: "All loss or damage arising from the nature of the work to be done under this agreement. . . . shall be sustained by the contractor." The firm of Tyron-Brain Company succeeded to Whittier's rights and obligations under the contract, and were proceeding with the work. When it was more than half completed, the contractors became aawre of the decision of this court in Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, which held that the clause in the specifications above quoted rendered the proceeding void. Tyron-Brain Company then prepared and presented to the owners of the property affected by the street work an agreement whereby, in consideration of their completing the work in a good and workmanlike manner, the property owner waived "any and all objection in law which he may have or be entitled to make to the legality or validity of the assessment for said improvement, or the legality or validity of any street improvement bond that shall be issued to represent the cost thereof;" the waiver applying to and binding the executors, administrators, grantees, and assigns. Mr. Tyron, of the Tyron-Brain Company, presented this waiver to plaintiff and her husband, explaining the purport of it, and explaining that his corporation feared the effect of the decision in Blochman v. Spreckels, and was unwilling to expend more money on the unfinished work, saving under this assurance from the property owners. Plaintiff's husband then retired to

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an adjoining room, and wrote the specific waiver which follows; it being signed both by himself and his wife, plaintiff herein: "I am unwilling to waive any question dependent upon the acceptance of the street supt. or counsel, but if an independent survey shall demonstrate that the work from Ave. 48 to Ave 50 is constructed upon the grade established by the ordinance fixing the grade of the street, I am willing to waive any right involved in the recent case decided by the Supreme Court, the San Diego case. Nothing here being construed as a waiver of damage to our property on account of injury to the property by the change of grade, by ordinance or otherwise." This waiver was recorded with the others. The contractors finished the work according to the specifications; it was duly accepted by the street superintendent; and the bond on plaintiff's property for the amount of the assessment thereon was duly issued. Plaintiff made no objection to the issuance of the bond, and never demanded the survey contemplated by the waiver, and paid the installments on the bond as they became due from January, 1904, to January, 1908, without protest. In February, 1905, the bond was purchased by Mrs. I. B. Huber, intervener herein, and she received the payments made after that date until January 2, 1908, when plaintiff refused to make further payments. Such was the situation until August, 1908, when the intervener, still the owner of the bond, requested the city treasurer to advertise the property for sale to satisfy the bond. The plaintiff then instituted against the city treasurer this action to restrain him from making the sale. The intervener caused a survey to be made, which established the fact that the work had been done according to the grade fixed by the ordinance, and this and other matters were pleaded both in the answer of the treasurer and in the complaint in intervention filed by the intervener. The answer and the complaint in intervention thus pleaded waiver and estoppel by contract. The findings of the court are outlined in the above statement of facts. As conclusion of law, it found that plaintiff was estopped by contract, and judgment was rendered accordingly. From this judgment plaintiff appeals.

It is contended that the finding to the effect that the case of Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, was the case meant by plaintiff's language in waiving "any right involved in the recent case decided by the Supreme Court, the San Diego case" is unsupported by the evidence. Upon this subject plaintiff's case rests wholly upon the testimony of Mrs. Allen, the plaintiff. Her testimony does not negative the finding. She admits her signature to the waiver, and her husband's and that the handwriting of the waiver is her husband's, but further than that her recollection fails to go. The admission of her attorney is: "She signed it. She is bound by it. What more?" The testimony of Mr. Tryon for the defendant and intervener, however, established without contradiction that he presented the waiver to Judge Allen, husband of plaintiff, explained the fear he felt as to the effect of the decision of the Supreme Court in the Blochman-Spreckels case (which was a case arising in San Diego county), and that after this explanation Judge Allen himself wrote the waiver above quoted, signed it himself, and procured his wife to sign it. The finding is therefore clearly supported.

The same is true of another finding of the court which is here at-

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tacked — the finding to the effect that the work had been completed in accordance with the specifications and ordinance. Indeed, it can hardly be said that there is an issue upon this proposition, since plaintiff's complaint alleges that it was under the contract and specifications in her complaint set forth, and under no other contract or specifications, that the contractors performed and completed the street improvement work. There is no denial of this in either the answer or in the complaint in intervention, but both contain averments to the same effect. Moreover, the issuance of the bond afforded prima facie evidence of the regularity of the proceedings, the acceptance of the work, and, consequently, that it was done according to the specifications. Statute 1899, p. 43. And, finally, the whole course of conduct of plaintiff's attorney under defendant's offer to prove in detail the performance of the work in accordance with the plans and specifications amounted to a specific waiver of any more formal proof than was actually made at the trial. Thus, said plaintiff's attorney, when offer of proof on this matter was made: "I have got my idea of it. They assert, and we deny. I don't know of any better way of their proving it than to prove the city accepted it. I think that is all the proof that is absolutely necessary." This invited proof was made.

The third objection of the plaintiff is that, treating the waiver as valid, there was a noncompliance with its terms which relieves her from the enforcement of it. This noncompliance, it is urged, comes from the fact that the "independent survey" which demonstrated that the work was constructed upon the grade established by the ordinance was not made by the parties jointly. But to this it must be answered that plaintiff's waiver does not in terms declare that a joint independent survey be made at the instance of both parties, and, whatever may have been her original right to participate in the making of such a survey, she waived it by her acquiescence in the issuance of and the payment of the installments upon the bond, and, when proof of the independent survey made by the intervener was offered to establish the true grade, by her failure even then to establish its error.

Appellant argues that under the authority of Blochman v. Spreckels assessment was void as against public policy, and that such being the case a waiver of the right to assert this is itself invalid. But in this appellant errs. It was not upon the ground of public policy that the specifications, such as those considered in Blochman v. Spreckels, were held to invalidate the contract. It was because they were in violation of and not authorized by the statute, and because the effect of permitting them might be illegally to increase the burden upon the property owner; but this determination was one for the protection and benefit of the property owner, and one which, therefore, he could waive. Civ. Code, § 3268.

The last contention of appellant is that she was not estopped, because "'there being no personal liability, the doctrine of estoppel in pais has no application." Waiving the fact that the estoppel in this case is founded on contract, and does not rest in pais, it must be conceded that appellant's position finds support in the language of **Heft** v. Payne, 97 Cal. 108, 31 Pac. 844. There the asserted estoppel was in pais. In an action to enforce a street assessment lien for work that had been completed after the time fixed for its performance, it was alleged that the defendant owner had expressly waived all objections

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which he might have by reason of the failure of the contractors to complete the work within the time fixed, and that he had stated that all he wanted was a completion of the improvement to the satisfaction of the council, and when that was accomplished no further objections would be made, and the assessment for the work would be paid; that, relying upon this, the council set aside the assessment and warrant, and ordered further work to be done, and that the contractor, relying upon the good faith of the promises, proceeded with the work and completed it to the satisfaction of the proper officers. Upon this statement, it is said by this court in department: "It is contended that the defendant is estopped by his representations and promises from claiming that the work was not done within the time required. But this is an action purely to foreclose a lien on the land for the cost of a public improvement. There is no personal liability, and under such proceedings the doctrine of estoppel in pais has no application. Meuser v. Risdon, 36 Cal. 239." A reading of Meuser v. Risdon, cited as the sole support for the doctrine thus announced, will disclose not only that it does not support the doctrine, but contains nothing in reference to it. In Meuser v. Risdon, the contractor had failed to perform the work, and it became necessary to relet the contract for it. The clerk of the board of supervisors, without authority from the board (even if such authority could be vested in him), undertook so to relet the contract. This court held under that state of facts, in an effort to collect the assessment for the work, that the reletting of the contract was a separate and independent proceeding, that the board of spuervisors could not transfer its duties and powers to call for bids to the clerk, and that the board of supervisors had not the power to ratify the invalid act of its clerk under the circumstances, so as to give validity to these invalid proceedings. It would seem that the learned author of the opinion in Heft v. Payne, supra, must have read Meuser v. Risdon as meaning a ratification by the property owner, for only upon the theory of such ratification could the doctrine of waiver or estoppel have any application. But in Meuser v. Risdon it was not contended that the property owner had by silence or by speech, or by action or inaction, done anything in the nature of waiver, ratification, or assent. The language in Heft v. Payne, therefore, stands absolutely without support in the authority cited to uphold it. In Union Paving Co. v. McGovern, 127 Cal. 638, 60 Pac. 169, language similar to that in Heft v. Payne is used as follows: "In an action to foreclose a lien upon land for the cost of a public improvement in which there is no personal liability, and where the proceedings are purely statutory, and the lien exists by virtue of a strict compliance with the provisions of the statute, the doctrine of estoppel in pais has no application." The sole authority adduced in support of this declaration is Heft v. Payne. We think it will be found impossible to sustain these declarations, either in reason or by authority. Whatever of the varying definitions of an estoppel may be accepted, they differ not at all in the one essential, namely, that by an estoppel a man is precluded from pleading or proving the truth, because, in the language of Coke (Coke on Lit. 352a), "a man's owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this:

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That a man is forbidden to show the existence of a fact because, by his past conduct, his declarations, his agreement, his deed, or a judgment, it would work an injustice and an injury to his adversary to permit him to do so.

The fact that in street assessment cases there is a lien upon property, and not a personal liability, has no bearing upon the question of an estoppel, whether arising in pais or by any other recognized method. One may estop himself from denying the existing of a lien upon his property as well as he may estop himself from denying a personal liability; and, while it is true that in street assessment cases the lien exists only by virtue of a strict compliance with the provisions of the statute, if a property owner has estopped himself from showing that there has not been a strict compliance with the statute, then as to his property there has been such strict compliance, and the lien exists. The declarations above quoted in Heft v. Payne and Union Paving Co. v. McGovern, must therefore be overruled, and, indeed, they have been overruled, though tacitly, in the later decision of this court in Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759, where the doctrine that estoppel, even in pais, may be successfully invoked against the owner of property in the case of a street assessment is recognized and approved by this court in bank. But that elsewhere the rule is universally recognized may be seen from a reading of 2 Elliott's Roads and Streets, § 731, and in the note to the section, where a very great number of cases are collated.

It follows, therefore, that the court was correct in its conclusion that plaintiff had estopped herself by her written waiver of her contract, and the judgment appealed from is therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

Decision No. 1460.

STEIN v. LEEMAN. (Sec. 1,863.)

(Supreme Court of California. December 8, 1911.)

119 Pac. 663.

INTEREST — ESTOPPEL — VENDOR AND PURCHASER.

On specific performance of a contract to convey, the purchaser should not be required to pay interest from the date of a refused tender of payment.

One holding an option to purchase an undivided half interest in land at four dollars an acre, by claiming on a former trial of a suit for specific performance, that the option was an offer to sell the vendor's interest at two dollars an acre and that a tender made in the language of the option was a tender of that amount, was not estopped to claim on a subsequent trial, and after the Supreme Court decided on appeal that the price was four dollars an acre and not two dollars as found by the trial court, to present his offer as a sufficient tender at four dollars an acre and as an acceptance of the option; he not having been put in default by any demand by the vendor for payment.

An equitable estoppel is not raised by conduct of one party to a suit unless, by reason thereof, the other party has been so placed as to make it unjust to him to allow the first party to change position.

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One suing on a contract can claim a construction unjustly favorable to him and ask for a larger judgment than he is entitled to without being estopped to claim his lawful right before the cause is determined, if the other party will not be prejudiced by the change of claim.

To constitute estoppel, the condition caused by the conduct of him to be estopped must be such that the other party will be prejudiced, if the first party is permitted to pursue another course, and claimant of the estoppel must himself have been ignorant of the truth of the matter or of the extent of his rights concerning the same.

Under Civ. Code (Cal.), § 1489, permitting a tender to be made at a creditor's residence if he evades the debtor, where a vendor evades the purchaser to prevent a tender of performance, the tender may be made at the vendor's residence.

Evidence held to show evasion by the vendor under a contract to convey, of a tender of performance by the purchaser, permitting a tender at the vendor's residence under Civ. Code (Cal.), § 1489.

An agreement by the grantee of an option to purchase land to bear a share of the expense of farming the land during the term of the option is sufficient consideration to support the option.

Under Civ. Code (Cal.), § 1605, making any benefit to which one is not lawfully entitled, sufficient consideration for a promise, an agreement to extend an option to purchase land, is sustained by the grantee extending the time for settlement by the grantor of an account arising under the original contract.

In Bank. Appeal from Superior Court, Madero County; J. J. Trabucco, Judge.

Action by M. P. Stein against Letitia A. Leeman, administratrix of the estate of J. F. Archibald. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed in department, and, on rehearing, affirmed by the Supreme Court.

Robert L. Hargrove and Frank H. Farrar, for appellant. Nicol & Orr and Francis A. Fee (Bert Schlesinger, of counsel), for respondent.

PER CURIAM. A re-examination of the questions involved in this case convinces the court of the soundness of the opinion and judgment rendered in department.

To the contention, for the first time advanced in the petition for a rehearing, that Stein should be compelled to pay interest from the date of his tender, a complete answer is found in Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308, and Wadleigh v. Phelps, 149 Cal. 642, 87 Pac. 93. For the reasons given in the department opinion, hereto appended, the judgment and order are affirmed.

"Shaw, J.: This is an appeal from the judgment, and from an order denying defendant's motion for a new trial.

"The cause was heretofore considered by this court upon an appeal by the defendant from a judgment given upon a previous trial and from an order denying defendant's motion for a new trial. The judgment and order then appealed from were reversed. Stein v. Archibald, 151 Cal. 220, 90 Pac. 536. After the first trial J. F. Archibald, the original defendant, died, and the present defendant, as administratrix of his estate, was substituted. The effect of the reversal was that the cause was remanded to the lower court for a new trial of all the issues made by the pleadings. There is no force in the defendant's contention that the decision of that appeal by this court required

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the lower court, upon the going down of the remittur, to enter judgment for the defendant without trial, and no merit in the motion of defendant to enter such judgment. Davis v. Le Mesnager, 155 Cal. 5520, 101 Pac. 910. Upon the new trial which took place judgment was again given for plaintiff.

"The action was to compel specific performance of an alleged agreement to sell and convey real estate, and for an accounting of the income therefrom. The agreement is set forth in the opinion upon the former appeal and it is not necessary to repeat it in full. It covered 9,680 acres of land. Its date was October 9, 1897. By its terms Archibald agreed to sell to Stein, 'an undivided one-half interest' in the tract, at any time within three years from its date, if, within that time, Stein should pay him 'four dollars per acre for the undivided one-half of all of said described land.' The time was afterwards extended to October 9, 1902. Upon the first trial the lower court construed the above quoted language to mean that Stein was to pay only at the rate of two dollars for the entire area of land, which it then found to be only 9,640 acres. It adjudged performance by Archibald upon payment to him of $19,280. The only point decided by this court, upon the appeal from that judgment, was that this interpretation was erroneous, and that Stein was bound to pay, in performance of the contract, at the rate of four dollars per acre for the entire area, for an undivided one-half interest therein.

"Before beginning the action Stein made a written offer of performance, following therein the exact language of the agreement with respect to the price, but not stating the sum total. It stated, 'You will please take notice that I am now able, ready, and willing and hereby offer to pay you the sum of four dollars per acre for an undivided one-half of all those certain lands,' describing them, upon the execution of a deed thereof, and it demanded a conveyance of said interest in said lands. The complaint, in substantially the same language, averred the making of the offer and the ability and readiness of plaintiff to pay upon the making of the proper deed. It did not allege the total sum or otherwise state the price of the land. The answer denied that the plaintiff had at any time offered to pay four dollars per acre, or any other sum for a conveyance of the land, or that plaintiff was able or ready to pay said sum, or any sum for such conveyance. Upon the first trial, the amount of money called for by the contract and covered by the offer was not mentioned or discussed. The written offer was produced as evidence and the plaintiff then in open court declared that he offered to 'pay to the defendant the sum of four dollars per acre for an undivided one-half of the land,' and to bring the money into court; but no computation of the amount was made or demanded, nor was anything said to indicate whether plaintiff thereby intended to offer to pay four dollars per acre for half the area, or four dollars per acre for the entire area. The only place in the record of that trial in which the total price of the land appears to have been mentioned or considered was in the conclusions of law and judgment filed and rendered on February 8, 1905, each of which declared that the plaintiff was entitled to a deed upon payment of $19,280.

"Thereafter the plaintiff insisted that this sum was the price fixed by the contract, and in opposing the appeal he claimed the full benefit of the judgment upon that construction until it was finally reversed

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and the cause remanded for a new trial. Upon the last trial plaintiff again relied upon the original written offer, presenting it at that time as a sufficient tender of the entire sum of $38,720, and he then formally offered to bring that sum of money, naming it, into court. The court, upon the last trial, found that the area was 9,680 acres. The appellant claims that the plaintiff, by his conduct, while obtaining the first judgment and upon the appeal therefrom, in claiming that the agreement was an offer to sell the undivided one-half of the land for $19,360 and that the written offer was a tender of that amount, only, was estopped, on the second trial, to present the offer as a tender of $38,720, or to assert that it was sufficient as an offer of performance, or as an acceptance of the option.

"In the opinion upon the former appeal it was said that the language of the option referred to the area and not to the interest, and that it called for the payment of $38,720 as the price of the undivided one-half interest to be sold. If the option had this legal effect, it necessary follows that the several offers to perform made in the written tender, repeated in the complaint, and again stated in court, being couched in the same language, would have the same legal effect. Therefore the tender was sufficient to convert the option into an enforceable agreement to buy and sell, and the complaint stated a good cause of action for specific performance. It does not appear that the defendant, at any time prior to the conclusion of the first trial and the filing of the findings and conclusions of law, made any objection to the language of the offer, or suggested that the sum offered was less than the price agreed to or that the offer did not specify the total amount of money offered, or that it was in any wise uncertain or ambiguous. Upon the written offer, according to its true meaning, the plaintiff was entitled to a decree of specific performance, at the time the cause was submitted upon the first trial, upon payment by him of $38,720. No demand of that sum, or offer to accept it, had been made by the defendant to put the plaintiff in default, and the plaintiff's offer, by its legal effect, was a good offer of performance for that amount. The plaintiff did not succeed in maintaining the judgment declaring him entitled to receive a conveyance upon the payment of half that sum. He failed in that contention and he gained nothing thereby. Neither did the defendant lose anything by reason thereof. His position was not changed for the worse by the erroneous judgment or by the unsuccessful effort of plaintiff to maintain the same upon the appeal. It is true that he incurred costs in prosecuting that appeal, but that outlay was recovered by the judgment. Defendant had the right, at any time before or after that decision, to offer a deed and demand the full sum of $38,720 as a condition of its delivery, and if, upon such demand, the plaintiff had failed to pay, he would have been in default, and the contract would have been at an end thenceforth. Defendant did not see fit to make any such offer or demand. His situation is substantially the same now as it was prior to the first judgment.

"'The case lacks some of the essential elements of an estoppel. An equitable estoppel is not raised by the conduct of one party in the course of a lawsuit, unless, by reason thereof, the other party has done some act or has been placed in a position that would render it unjust to him to allow the first party to change his own position in

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regard to the matter. Speaking of estoppels in the course of proceedings in court, Mr. Bigelow says: 'Where, then, no wrong would be done to the court or to the other parties to a cause by permitting a change of position, a change should in principle and will in fact be allowed.' Bigelow on Estoppel 723.

"A party suing upon a contract has a right to claim a construction thereof more favorable to him than it will bear and ask for a larger judgment than he is entitled to, and if he is refused such relief before the cause is determined, and the other party will not be prejudiced by a change of plaintiff's claim, plaintiff will still be at liberty to contend for that which is his lawful right.

"In order to constitute an estoppel, the condition brought about by the conduct of the party to be estopped must be such that the other party will be injured or placed in a worse position if the first party is allowed to pursue another course or assert the fact to be contrary to his first statement, and the party claiming the estoppel must himself have been ignorant of the truth of the matter, or of the extent of his rights concerning the same. Boggs v. Merced M. Co., 14 Cal. 368; Davis v. Davis, 26 Cal. 40, 85 Am. Dec. 157; Dean v. Parker, 88 Cal. 287, 26 Pac. 91. These elements of estoppel, as we have seen, did not exist. The defendant may still preserve the rights he has under the contract, notwithstanding the unfounded claim of the plaintiff as to the price. The defendant was not at any time during the litigation ignorant of the terms of the contract, or of his rights under it. He was, in fact, insisting that the option had expired, and was unwilling to sell at the price he agreed to take by the terms of the option, namely, $38,720. We hold that the plaintiff is not estopped to insist now that his offer of performance was an offer to pay the true amount fixed by the contract as construed upon the former appeal.

"The appellant further contends that the written offer was insufficient because it was not made to Archibald in person. Stein resided at Stockton; Archibald resided near Madera on the land. On September 20, 1902, Stein sent a letter by registered mail addressed to Archibald at Madera, which was his post office address, stating therein his intention to settle with Archibald, and close the deal. Archibald was in Madera on that day, and again on September 25th. The letter was delivered to his sister, on September 24th, and Archibald did not receive it until October 13th. About the 1st of October, Archibald left his house in a wagon and traveled to Alameda county, and from thence to Santa Cruz and Watsonville, staying but a short time in one place, and remained away from Madera until October 13th. This and other evidence, which we need not state in detail, shows clearly that he was endeavoring to evade the making of any offer by Stein. On the 6th of October, 1902, Stein went to Madera and made fruitless inquiries there for Archibald. From thence he went to Archibald's residence and inquired of his sister as to his whereabouts, and was informed that he was away from his home and that she did not know where he was. Thereupon, at Archibald's said residence, Stein delivered to her for Archibald the written tender in question. He also deposited a copy thereof in the post office at Madera, addressed to Archibald. The action was begun on October 8, 1902. These facts we think are sufficient to show that the tender was properly made. 'An offer of performance must be made to the

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creditor, . . . if such creditor is present at the place where the offer made be made; and if not, wherever the creditor may be found.' Civ. Code, § 1488. If this were the only provision of law upon the subject, the tender might be insufficient, but section 1489 of the Civil Code is as follows:

"'In the absence of an express provision to the contrary an offer of performance may be made, at the option of the debtor.

"'(1) At any place appointed by the creditor; or,

"'(2) Wherever the person to whom the offer ought to be made can be found; or,

"'(3) If such person cannot, with reasonable diligence, be found within this State, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the State; or,

"'(4) If this cannot be done, then at any place within this State.'

"It appears from this provision that where the seller of land evades the buyer for the purpose of preventing a due offer of performance, the offer may be made at his place of residence. As we have said, the evidence shows that Archibald absented himself in order to evade the making of such offer. In that event it could have been made at his residence, and as it was made at that place on the 6th of October, 1902, two days before the suit was begun, the tender was complete.

"Appellant also claims that the agreement is merely an option and that it was without any consideration. This contention cannot be maintained. It is true that the agreement was a mere option, but a sufficient consideration therefor appears from the terms of the instrument itself. It recites that 'such party of the first part, in consideration of the agreement hereinafter expressed, to be performed by the party of the second part' (Stein), agrees to sell and convey the land, within three years. Another clause in the agreement provides that, during the terms of years therein specified, Stein would bear equally with Archibald all the expenses incurred in farming the land, and that Stein was to have one-half of the gross income arising therefrom. This agreement of Stein to assist in the farming operation was a sufficient consideration for the option. It was further contended that the two years' extension of the term of the agreement was without consideration. This claim also is without foundation. There is evidence to show that Stein and Archibald had farmed the land together for the first two years of the term of the contract, that Stein had paid out about $5,000 to assist therein, that Archibald had received and retained all the income therefrom, and that the account of these transactions required a settlement before it could be ascertained how much Stein should pay if he desired to purchase the land. The original contract expired on October 9, 1900. On that day Stein told Archibald that he was ready to settle the account and find out what was owing, and wanted to pay him whatever was due and receive a deed for half the land. Archibald then said he was not ready to make a settlement, but would try to get up the account as soon as possible, and upon Stein's objection that the contract was about to expire, Archibald said that he would renew it, and thereupon he executed a written contract extending the time for two years. Any benefit received by the maker of a promise to which he is not lawfully entitled is a sufficient

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consideration for its execution. Civ. Code, § 1605. Archibald by this promise obtained an extension of the time within which to get his account ready. The benefit may have been trifling, but he was not otherwise lawfully entitled to it, and it was sufficient to sustain the contract, as a matter of law. Smith v. Bangham, 156 Cal. 364, 104 Pac. 689, 28 L. R. A. (N. S.) 522.

"These comprise all the points which we deem it necessary to discuss."

BEATTY, C. J., does not participate in the foregoing decision.

Decision No. 1461.

NORTH BRITISH & MERCANTILE INS. CO. v. ROBINETT & GREEN.

(Supreme Court of Appeals of Virginia. November 16, 1911.)

72 S. E. 668.

INSURANCE — WAIVER.

A stipulation in a fire policy for appraisal of a loss when required, as a condition precedent to an action on the policy, is valid, and when required is a condition precedent to an action for a loss.

Though contracts of insurance are liberally construed in favor of insured, he must comply with the plain provisions of the policy.

A fire policy, stipulating that insured shall have sixty days from the date of a fire to deliver proof of loss, and that the loss shall not become payable until sixty days after delivery of proof of loss, including an award by appraisers, where an appraisal is required, gives to insurer the right, at any time within sixty days after the delivery of proof of loss, to demand an appraisal.

A fire policy stipulated for an award by appraisers when required. Insured gave prompt notice of a loss, and furnished proof of loss. An agent of insurer notified an attorney of insured that the amount of the loss claimed was excessive, and demanded an appraisal. During the investigation, the agent made no response to a question put to him as to whether an appraisal was desired. Held, that insurer did not waive its right to an appraisal; a waiver, to be effective, must have occurred with full knowledge of all material facts, and must be distinctly made.

The insurer was not estopped from insisting on an appraisal; for, to create an "estoppel by conduct," the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied, except for such conduct.

Error to Circuit Court, Wise County.

Action by Robinett & Green against the North British & Mercantile Insurance Company. There was a judgment for plaintiffs, and defendant brings error. Reversed and rendered.

CARDWELL, J. This suit is brought upon a policy of insurance issued by plaintiff in error to defendants in error, insuring the latter against loss or damage by fire to their stock of merchandise, situated

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at Appalachia, Wise county, Va., for the period of one year from the date and delivery of the policy, not to exceed three-fourths of the actual cash value of each item of property insured at the time of loss or damage, less the amount covered by any concurrent insurance, not to exceed, however, $1,500, while contained in a certain building in the town of Appalachia; the consideration for the insurance being the premium mentioned, and the performance on the part of the insured of the conditions and stipulations set forth in the policy.

A fire occurred April 17, 1909, at about 11.30 o'clock p. m., in a building not owned by or connected with the property of the insured, which rendered necessary the removal of their stock of goods. None of the goods were destroyed or damaged by fire or smoke, but were damaged, according to the claim made by the insured, fifty per cent. of their value, or to an amount somewhat exceeding $2,000, by their removal from and back into the same building.

Among the almost innumerable provisions contained in the policy, and found in practically all like policies of insurance, is one which provides that in case of loss, if the assured and insurer differ as to the loss sustained, then an appraisal of the property is to determine the amount of the loss.

The policy contains these provisions also: "The loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company, including an award of appraisal where appraisal has been required."

"No suit or action on the policy for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

On the next day after the fire, to wit, April 18, 1909, the insured notified the insurance company of the fire and the damage to their stock of goods; they also notified the agent of the company who resided at Appalachia, and who had issued the policy in question, countersigned it, and collected the premium thereon. The company nor its agents made any reply to the notices, and, on May 15, 1909, proof of the loss was forwarded by the insured, and was received by the insurance company on May 18, 1909. In the early part of June, 1909, the company sent one C. L. Garnett, an adjuster and an employee of the Virginia Adjustment Bureau, to Appalachia, to adjust the loss on the building which contained the stock of goods of plaintiffs insured, and also to adjust the loss of another insurance company which had issued a policy on the same stock of goods. After Garnett left Richmond for Appalachia, the insured (plaintiffs in error) employed also said Virginia Adjustment Bureau to adjust their loss; and all of the papers pertaining to the fire of April 17, 1909, were mailed from Richmond, addressed to Garnett at Appalachia, but Garnett never received them, and on returning to Richmond he so notified R. M. Friend, president of the Adjustment Bureau. Friend had the papers returned to Richmond, and, on June 29, 1911, he went to Appalachia to adjust the loss, but, after examining the stock of goods, getting such information as he could, and consulting Garnett, who had examined the stock of goods soon after the fire, demanded an appraisal in accordance with the conditions of the policy, which demand was made in writing, by letter of July 2, 1909, addressed to and re-

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ceived by the insured's counsel July 5, 1909, the said letter being as follows:

"RICHMOND, VA., *July 2nd*, 1909.

"Messrs. Morton & Parker, Attorneys, Appalachia, Va. —

"Dear Sirs: We are in receipt of papers purporting to be proofs of loss under policy No. 4962619 of the North British & Mercantile Insurance Company issued in the name of Robinett and Green.

"The amount of loss and damage named therein is excessive, and we respectfully demand an appraisal in accordance with the terms and conditions of the policy.

"Expressly reserving all rights of the company under the policy contract, we are

"Yours very truly,

"[Signed] ROBERT M. FRIEND,

"President."

To this letter the insurance company received the following reply:

"GATE CITY, VA., *July 6*, 1909.

"Mr. Robert M. Friend, Richmond, Va. —

"Dear Sir: In your letter of July 2, and received on July 5, 1909, in reference to the Robinett and Green claim you used this expression: 'Expressly reserving all rights of the company under the policy contract, we are,' etc.

"Please explain what you mean by this statement so that we will know just how to answer you. You will recall that Mr. Parker asked you the direct question as to whether you wanted an appraisal and you at that time gave him no definite answer. That occurred more than one month ago. So please let us know by return mail what you mean and we will give you an answer.

"Yours truly [Signed] W. S. COX."

Considering, doubtless, that the letter of July 2d, supra, required no explanation, the company made no reply to the letter of Attorney Cox, and thereafter, while there was some correspondence between counsel for the respective parties, practically nothing was done by either party towards an adjustment of the loss of the insured, and this suit was instituted on December 3, 1909.

At the trial of the cause, upon the defendant company's plea of nonassumpsit, the grounds of its defense stated in writing were:

(1) "No ascertainment or estimate was agreed upon as provided in said policy; the parties differed as to the amount of the loss or damage; the same has not been determined by appraisals as provided in the policy; the plaintiffs did not demand an appraisal as required by the policy. An appraisal was demanded by the defendant in accordance with the terms and conditions of the policy, and they failed, declined, and refused to have an appraisal, as required by the policy.

(2) "That the three-fourths value clause was attached to the policy, and was made one of the conditions and provisions of same.

(3) "That the policy sued on was for $1,500, and $2,000 concurrent insurance was permitted. Another company issued a policy for $500, and appellees collected same; therefore if plaintiffs were entitled to recover anything, they were only entitled to recover three-fourths of the actual damage to said property, less $500 heretofore paid them."

After the evidence of the respective parties had been introduced, and the court had instructed the jury as to the damages they were

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to assess, the defendant company demurred to the evidence, and the plaintiffs joined in the demurrer, which demurrer the court overruled and gave judgment on the verdict of the jury, assessing plaintiffs' damages at $1,500, with interest, to which judgment this writ of error was awarded.

There are two assignments of error, the first relating to the ruling of the court on the demurrer to the evidence, and the second to the instruction given by the court to the jury on the amount of damages to which the defendants in error were entitled under the policy sued on, if entitled to a recovery at all; but, in the view we take of the case, it will be only necessary for us to consider the first assignment, which presents the question whether or not this action has been brought prematurely; the defendants in error having declined or failed to enter into an appraisal of their loss, as provided for in the policy sued on, and demanded. This question has not been directly passed on by this court, but has been by the Supreme Court of the United States and by the appellate courts of a number of the States.

In Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, it is said, in the opinion by Mr. Justice Gray, that a stipulation in a policy of insurance for appraisal is uniformly held in this country and England to be valid, and is a condition precedent to the right of recovery; and in Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, the opinion by the same learned judge holds that, if the contract of insurance further provides that no action upon it shall be maintained until after an award by arbitrators is made as to the amount due upon it, "then, as was adjudged in Hamilton v. Liverpool, London & Globe Ins. Co., above cited, and many other cases therein referred to, the award is precedent to a right of action on the contract." See, also, Carroll v. Girard Ins. Co., 72 Cal. 297, 13 Pac. 865; Mosness v. German Am. Ins. Co., 50 Minn. 341, 52 N. W. 932, and Graham v. German American Ins. Co., 75 Ohio 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055; Grady v. Home Ins. Co., 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 292; Dunton v. Westchester F. Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058.

In Carroll v. Girard Ins. Co., supra, the opinion, referring to the view uniformly taken that stipulations for an appraisal are a condition precedent to the right of action on a policy of insurance, says: "The logical result of this view is that the award is a necessary element of the plaintiff's cause of action."

In Grady v. Home F. Ins. Co., supra, it is held that: "Arbitration as to the amount of the loss is a condition precedent to an action on an insurance policy, where the policy expressly provides that no action shall be sustainable until full compliance with all conditions, one of which is that in case of dispute the amount of loss shall be fixed by arbitration. Failure of arbitration through no fault of the insurance company does not abrogate a provision in the policy that no action shall be brought until the amount of the loss has been settled by arbitration, and there is nothing to show that arbitration has become impossible" — citing Hamilton v. Home Ins. Co., supra, and a large number of other cases.

The opinion in Hamilton v. Home Ins. Co., supra, further says: "The manifest intention of the agreement of the parties to the contract of insurance was that any difference arising between them as to

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the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company. . . . The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country" — citing a number of authorities.

"Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

Contracts of insurance, as counsel for defendants in error agree and the authorities hold, are to be liberally construed in favor of the assured; but the policy is a contract, and it is just as much the duty of the assured to comply with the plain provisions of the policy, as it is the duty of the insurer to pay the amount of the loss, when that amount has been properly ascertained in accordance with the terms of the contract.

The case of Tilley v. Insurance Co., 86 Va. 811, 11 S. E. 120, is cited in support of the contention that a stipulation in a policy of insurance for an appraisal is not a condition precedent to a right to recover on the policy; but, with respect to that case, we need only to say that it merely disposed of the question as to what should be alleged in a declaration on an insurance policy, in view of section 3251 of the Code of 1904, and what is there said has no sort of bearing upon the question here under consideration. Very true the opinion in the case cited does refer to the provision in the policy that suit thereon could only be brought within one year from date of a loss, and says that it would be an unreasonable construction of the policy that the award stipulated for in the policy could be asked for just before the expiration of the year, and thus defeat all recovery; but such is not the case here.

Nor does the case of Summerfield v. North British, etc., Ins. Co. (C. C.) 62 Fed. 249, which had under review a similar policy of insurance to that here in question, sustain the contention of defendants in error. In that case, Paul, J., did hold that the plaintiff had the right to bring and maintain an action on her policy, although there had been no appraisement of the loss sustained by her for which she claimed damages; but this ruling was upon the peculiar facts of that case, and could not have been intended to impair the force and controlling influence of the decisions of the Supreme Court of the United States referred to above. On the contrary, the case considered by Judge Paul was by him distinguished from those cases, upon the

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ground that the defendant company refused to submit to an appraisement, except upon the terms of the form of submission proposed by it; whereby, says the opinion, "it placed itself in the attitude of the plaintiff Hamilton in the case of Hamilton v. Liverpool, etc., Ins. Co., and under the authorities of the cases there cited judgment must be entered in this cause for the plaintiff.

The decisions of this court in Liquid Carbonic Co. v. Norfolk & Western Ry. Co., 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753, Atlantic Coast Line R. Co. v. Bryan, 109 Va. 532, 65 S. E. 30, and Virginia Car. Co. v. Southern Ex. Co., 110 Va. 666, 66 S. E. 838, by analogy have an important bearing in the consideration of the issue we now have in hand.

In the first two of the cases just cited, it is held that a condition in a bill of lading that claims for loss or damage shall be made in writing to the carrier's agent at the point of delivery promptly after the arrival of the property, and, if delayed more than thirty days after the delivery of the property, or after due time for the delivery thereof, there shall be no liability upon a carrier, is a reasonable provision, and will be upheld; that such a provision contravenes no public policy and excuses no negligence, but is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged; and that such a provision in the contract, unless waived, is enforceable by the carrier in bar of any action by the shipper for such loss or damage.

In the third case last cited, it was held that a provision in a receipt, given by an express company for the carriage of goods, that the company shall not be liable for any loss or damage, unless the claim therefor shall be presented in writing to it at the office of issue within thirty days from its date, is a reasonable and binding provision, which must be complied with according to its tenor; otherwise the company cannot be held liable.

Defendants in error in this case contend, however, that, notwithstanding the existence of the general rule with respect to the construction of a contract of insurance and the enforcement of its provisions in the cases we have cited, and the almost innumerable authorities cited in those cases, they escape the effect of the rule by invoking the doctrine of waiver. It is not claimed that there was any agreement on the part of plaintiff in error to waive the right it had to an appraisal under the provisions of the policy sued on; but it is claimed that it is estopped by the conduct of its agents to claim the benefit of that provision in the policy.

There is practically no conflict in the evidence introduced in the case, and the facts appearing therefrom are as follows: Both defendants in error testify that notice was given promptly of the fire, which occurred on April 17, 1909, as required by the policy; that a month afterwards they forwarded proof of loss to plaintiff in error, which was received by the latter May 18, 1909; that no other communications were had between the parties until June 29, 1909, when Friend, agent of plaintiff in error, went to Appalachia, at which time he secured certain information in reference to the loss, and after returning to Richmond obtained further information from Garnett, who had examined the stock of goods a few days after the fire. When fully

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informed as to the actual loss, Friend, on July 2, 1909, wrote the letter of July 2d to Messrs. Morton & Parker, attorneys, saying that the amount of the loss, as claimed in the proof of loss — $1,753.42 — was excessive, and demanded an appraisal in accordance with the conditions of the policy.

The policy provided that defendants in error should have sixty days from the date of the fire to make out and deliver the proof of loss, and that the loss should not become due until sixty days after the proof of loss had been delivered, including an award by appraisers, if an appraisal should be required. Equal rights were contemplated in the contract to each of the parties thereto, sixty days being given to furnish proof of loss on the part of insured, and sixty days after the proof of loss had been furnished the insured could demand payment; and, clearly, during all of the last-mentioned sixty days the insurer was to have the right to investigate the amount of the loss and its liability therefor. It is equally as clear that the insurer was given the right, at any time within the sixty days after the proof of loss was delivered, to demand an appraisal, which it did. May on Insurance (4th Ed.), § 479; Joyce on Insurance, § 3182.

It further appears from defendants' in error own testimony that the appraisal could have been had when the demand therefor was received, on July 5, 1909, and later; in fact, until defendants in error, without responding to the demand for an appraisal, or requiring one themselves, had sold off a part of the insured goods, and so intermingled the balance with other goods that a satisfactory appraisement could not be had.

It will not do to say that there was no disagreement as to the loss, and therefore no reason for an appraisal, when the letter of July 2, 1909, demanding the appraisal, distinctly stated that the writer, as the agent of the insurer to adjust the loss, considered the claim made in the proof of loss furnished it was excessive. Nor is there any merit in the contention that plaintiff in error waives its right to an appraisal when Friend, the adjuster, made no answer to an attorney for defendants in error when he asked Friend, on June 29, 1909, the question: "Mr. Friend, do you want an appraisal in this case? If you do, we will give it to you." Friend, testifying in this case, neither affirms nor denies the statement of said attorney (Parker) that he made no reply to the question asked him, but states that he, on the occasion referred to, had very little talk with Parker, and was not then ready to talk about an adjustment of the claim asserted by defendants in error. It also appears that Friend had gone to Appalachia for the purpose of investigating this loss, went to the store of defendants in error, and, after looking at the stock of goods, was not satisfied, but wanted to secure further information from Garnett, who had seen the goods in their original damaged condition; that it was after getting full information that Friend wrote the letter of July 2, 1909.

It is a well-settled principle with respect to the doctrine of waiver, applicable as well to insurance transactions as to other business dealings, that a waiver, to be effective against the party making it, must have occurred with full knowledge of all material facts, and must be distinctly made. And, in order for there to be an estoppel by conduct, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would

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have occupied, except for that conduct. Atlantic Coast Line v. Bryan, supra; Virginia-Carolina Co. v. Southern Express Co., supra, and authorities cited.

There is no proof whatever in the record to make available to defendants in error, either the doctrine of waiver or estoppel, and the loss of the right to institute and maintain this action is due to their dereliction alone.

For the foregoing reasons, the judgment of the Circuit Court against plaintiff in error upon its demurrer to evidence is erroneous, and will be reversed and judgment entered by this court for defendant in the court below, plaintiff in error here.

Reserved.

Decision No. 1462

STEPHENS LUMBER CO. v. CATES.

(Supreme Court of Florida. June 30, 1911. On Rehearing, October 10, 1911.)

56 So. 298.

SALES — WORK AND LABOR — QUASI-CONTRACTS.

Where there is a special contract of sale, and the contract has been breached by the seller to the injury and damage of the purchaser, he may set up the contract and its breach and the damages sustained resulting as a proximate consequence of such breach by way of set-off to the claim for the value of the goods, but a party may not purchase and retain the goods of another, and, when sued for their value, set up a breach of contract in the sale and purchase to defeat payment.

Where the contract is entire, the general rule is that, if the plaintiff has failed to perform the whole on his part, he can recover nothing, for, being entire, it cannot be apportioned; but if the part performance of a contract is beneficial to the promisee and has been accepted by him, though the other party can maintain no action upon the original contract, his part of which he has failed to perform, yet he may maintain a general assumpsit for the actual value of his labor and materials which the promisee has accepted and enjoyed.

In Banc. Error to Circuit Court, Leon County; J. W. Malone, Judge.

Action by William M. Cates against the Stephens Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. M. Powell, for plaintiff in error. J. B. Moffett and W. C. Hodges, for defendant in error.

PARKHILL, J. The defendant in error sued the plaintiff in error in the Circuit Court for Leon county for a balance claimed to be due on account of the purchase price of certain lumber sold by Cates to the said company. The declaration contained the common counts. The defendant filed a plea of never was indebted as alleged. Other pleas of privilege have no bearing upon the assignments of error. The trial resulted in a verdict and judgment for plaintiff for $212.68, and the defendant sued out writ of error.

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The plaintiff testified in his own behalf that he sold and delivered five car loads of lumber to the defendant, and stated the car number and value of the lumber shipped in each car, the same as set forth in the bill of particulars. He did not measure or count the pieces. He testified as to the quantity and value of the lumber shipped after refreshing his memory from a leaf out of his ledger. The account was made up and written by him in his own handwriting at the time of the transaction from invoices made from written reports of his inspector, Mr. Cheek. This testimony was objected to, as well as the preliminary question to which it was an answer, and afterwards a motion was made to strike it out, but the court overruled the objection to the motion, an exception was noted, and the rulings are assigned as errors. Even if the court erred thereby, the error was cured by the subsequent testimony of the only witness for the defendant, its bookkeeper, J. M. Taylor, who did not deny the correctness of the account as testified to by the plaintiff, nor the receipt of the lumber by the defendant, but testified the account had been paid in full. This was an implied admission of the correctness of the account.

The second and third assignments have been disposed of by what we have already said. The fourth and fifth assignments are expressly abandoned, and will not be considered.

Upon the conclusion of the testimony, the defendant moved the court to charge the jury to render a verdict for it because "the suit is based upon common counts, and it appears by all the evidence that the transactions in the suit arose out of special written contracts between the parties which have not been performed by the plaintiff." The court did not err in refusing to so instruct the jury.

When there is a special contract of sale, and the contract has been breached by the seller to the injury and damage of the purchaser, he may set up the contract and its breach and the damages sustained resulting as a proximate consequence of such breach by way of set-off to the claim for the value of the goods, but a party may not purchase and retain the goods of another, and, when sued for their value, set up a breach of contract in the sale and purchase to defeat payment. Dalton v. Bunn, 137 Ala. 175, 34 South. 841.

The evidence is sufficient to support the verdict, and the judgment is affirmed.

All concur, except SHACKLEFORD, J., absent.

On Rehearing.

PARKHILL, J. On petition for rehearing objection is made to that part of the opinion holding: "When there is a special contract of sale, and the contract has been breached by the seller to the injury and damage of the purchaser, he may set up the contract and its breach and the damages sustained resulting as a proximate consequence of such breach by way of set-off to the claim for the value of the goods, but a party may not purchase and retain the goods of another, and, when sued for their value, set up a breach of contract in the sale and purchase to defeat payment." It is contended that in and by this part of the decision the court has not considered the decision in Sanderson v. Hagan, 7 Fla. 318, 320, 324, to the effect that a plaintiff, suing only upon the common counts, cannot recover upon

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a special contract without showing it to have been fully performed. And it is contended that the evidence herein shows a part of the lumber furnished by the plaintiff was rejected by the defendant as being defective in quality.

We do not consider what we have said in the instant case to be in conflict with the holding in Sanderson v. Hagan. In the latter case there was evidence that the defendant Sanderson "refused to receive the logs under the contract and claimed that plaintiffs should fulfill their contract." In the instant case the defendant only claims to have rejected a small quantity of the lumber furnished by the plaintiff, and received and accepted and used a much larger portion of it, nearly all in fact.

As stated in Greenleaf on Ev. (16th Ed.) p. 119, § 136a: "Where the contract is entire, the general rule is that, if the plaintiff has failed to perform the whole on his part, he can recover nothing; for, being entire, it cannot be apportioned. And this rule has been often applied to contracts for labor and services for a certain term of time, where the party had served only a part of the time. But it is also conceded that if the part performance of a contract is beneficial to the promisee and has been accepted by him, though the other party can maintain no action upon the original contract, his part of which he has failed to perform, yet he may maintain a general assumpsit for the actual value of his labor and materials which the promisee has accepted and enjoyed."

In the instant case the plaintiff sued in general assumpsit upon the common counts, there being no count upon a special contract designating the quality of the lumber and fixing the price per thousand to be paid for the same. The plea was the general issue. The issue was upon the quantum valebant, and the plaintiff in not relying on proof of a special contract as a basis of recovery.

The plaintiff does not claim under a special contract. The orders and account sales were evidently introduced by the plaintiff as evidence of the receipt of lumber by the defendant. Shipman's Com. Law Pleading, p. 21.

It is contended the evidence shows the defendant did not "retain" the lumber, but rejected defective parts thereof, and promptly notified plaintiff. There was no evidence that defendant properly rejected any part of the lumber. There was no evidence that any part of the lumber was defective in quality. There were entries in the account sales furnished by the defendant that certain pieces of lumber were rejected as being sappy, etc.; but, even if these entries were evidence thereof, they were evidence merely of the rejection of pieces of lumber by the defendant, and not evidence that they were properly rejected. But, even if a small quantity of the lumber was properly rejected, the defendant purchased and retained a large quantity of good lumber, and for its value the plaintiff sues on the common counts only, as he had a right to do. No error has been made to appear, and the petition for rehearing is denied.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

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HOCKER, J. (concurring). The rule laid down in Sanderson v. Hagan, 7 Fla. 318, to the effect that, where there is a special contract, plaintiff cannot recover under the common counts, expresses, I think, the general rule applicable to the facts of that case, but not the exceptions. The plaintiffs' own witness Daniel not only testified that there was a special contract with respect to the quality of the logs to be delivered, but also that the logs which were delivered by the plaintiffs were refused by the defendants because they did not come up to the contract, who claimed that the plaintiffs must fulfill their contract. The facts of this case are entirely different, for the lumber was delivered by the plaintiff and the greater part at least accepted by the defendant, and when there has been an acceptance by the defendant of a part of the articles contracted to be delivered, and they have had the benefit of them, their value according to the weight of authority can be recovered under the general assumpsit. 2 Smith's Leading Cases (9th Ed.) pp. 1229, 1230; Shipman's Common-Law Pleadings, pp. 22, 23. In such a case the special contract may be evidence of the damages. Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463. When a contract has been fully executed, the price agreed to be paid can be recovered under general assumpsit, and the contract is evidence of the damages. Authorities above cited, and Bank of Columbia v. Patterson's Adm'r, 7 Cranch 299, 3 L. Ed. 351; Williams v. Sherman, 7 Wend. (N. Y.) 109.

Decision No. 1463.

FRAZIER et al. v. STATE BANK OF DECATUR.

(Supreme Court of Arkansas. November 27, 1911.)

141 S. W. 941.

BILLS AND NOTES — REFORMATION OF INSTRUMENTS — EVIDENCE — ESTOPPEL — ALTERATION OF INSTRUMENTS — CORPORATIONS.

If the payee of a note of a corporation offered to renew it for a new note signed by the corporation and by its directors personally, and sent a note so drawn to the corporation to be executed and returned, and the directors so executed it that it bound only the corporation and themselves in their official capacity without calling the payee's attention to the changes therein, and the payee without noticing such change surrendered the old note, such surrender and acceptance of the renewal note would not bind the payee, being under a mistake of fact as to the identity of the instrument.

While the reformation of a contract involves its attempted enforcement as reformed, rescission only involves the abandonment of a contract which the parties did not intend to make, and, while a party cannot have a contract reformed for a mistake which is not mutual, he can have it rescinded for a mistake on his part only; there being no contract because of a want of meeting of the minds of the parties.

To show that a renewal of a promissory note originally executed by a corporation was accepted by the payee under the impression that it was signed personally by the directors as well as by the corporation, when it was only signed by the directors

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for the corporation, does not violate the parol evidence rule; such evidence showing a mistake as to the identity of the subject-matter of the contract.

The rule that one who signs a contract without reading it, when he has an opportunity to do so, cannot rely upon his ignorance to avoid the contract, would not apply to prevent the payee of a note from showing that a renewal note was accepted by it under the belief that it was signed personally by the directors of the corporation as well as by the corporation; no rights being asserted under the contract, and the note not being signed by the accepting party and not being the sole evidence of the transaction.

Any negligence of the cashier of a bank in accepting a renewal note without examining it to see if it was signed by the directors of the maker-corporation personally as understood by the parties would not estop the bank from rescinding acceptance of the renewal note for mistake, in absence of a showing that the parties had changed their position to their injury.

The alteration of an instrument by one of the obligors before delivery for the purpose of expressing the real intention of the parties does not avoid the contract.

The fact that the secretary of a corporation, in signing a renewal note of the corporation which the payee understood was to be signed by the directors personally, in adding the word "Sec." to show that he signed merely for the corporation, used different ink from that in which the original signatures were written, would not of itself give notice to the payee afterwards accepting the note of such change.

In absence of notice to the payee, a material alteration of the capacity in which one of the makers signed would not affect the liability of the other indorsers or makers.

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by the State Bank of Decatur against W. M. Frazier and others. From a judgment for plaintiff against part of the defendants, they appeal. Affirmed.

Rice & Dickson, for appellants. McGill & Lindsey, for appellee.

McCULLOCH, C. J. The plaintiff, State Bank of Decatur (a domestic corporation, engaged in the banking business), instituted this action in the Circuit Court of Benton county against the Sanders Fruit & Manufacturing Company (another domestic corporation) and certain of its directors, to recover the amount of two promissory notes, each for $1,000, with interest, executed by said defendants to plaintiff, which said notes are alleged to have been surrendered to defendants by plaintiff through mistake. It appears from the record that separate actions were first instituted; but during the pendency of the cases the pleadings were lost, and a complaint was substituted covering both actions and treating them as consolidated. No question, however, is made upon this point. A trial before a jury resulted in a verdict in favor of plaintiff against the defendants who were found to have signed the notes, and the latter have appealed to this court.

It appears from the evidence that in September, 1907, defendant Sanders Fruit & Manufacturing Company borrowed the sum of $1,000 from plaintiff bank and executed its note therefor. Payments have been made from time to time, which reduced the amount due on the note to the sum of $400. On November 25, 1907, the Sanders Company borrowed from the bank $1,000 and executed its note therefor with certain of its directors, who are defendants in this action, as joint makers or indorsers, and on January 3, 1908, the Sanders Com-

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pany borrowed the further sum of $1,000 from the bank and executed its note with defendant Frazier, who was one of the directors, as joint maker or indorser. About June 1, 1910, after these notes became due and were unpaid, negotiations began between the parties for a renewal thereof, and the evidence tends to show that the cashier of the bank proposed to the defendants, by written correspondence and verbally, that a renewal would be accepted in the form of a new note signed by the Sanders Company and indorsed by the directors, or some of them, for the full amount of the three notes; the accrued interest to be paid at the time of the renewal. The cashier of the bank sent to the defendants by mail a form of note to be executed reading, "We, or either of us, promise to pay," etc. The directors of the Sanders Company, pursuant to the negotiations, held a meeting, and after erasing the words, "or either of us," and inserting in lieu thereof, "as directors," executed the note for the Sanders Company and signed it in their official capacities as directors so as to make only the corporation liable on the note. One of these directors, the defendant Frazier, carried the note to the bank, together with a check for the accrued interest, and delivered the same to the cashier, saying, as the testimony tends to show, "Here is the note," and asked for the old notes, which were then surrendered to him by the cashier. The cashier testified that the transaction was very hurriedly done on account of Frazier having to leave in a few minutes to catch a train, and that he (witness) did not take time to examine the note carefully, but glanced at it and saw that the names of the directors were signed, and, believing that the names were signed so as to bind them as indorsers or joint makers, he accepted the new note and surrendered the old ones, and did not discover the mistake until some time thereafter. This occurred on June 17, 1910, and the alleged mistake was discovered by the cashier on July 8, 1910, when he wrote to the Sanders Company and each of the directors calling their attention to the fact that the renewal note as signed did not make them liable and that a new note must be executed. The evidence adduced on the part of the defendant tended to show that they did not, in signing any of the notes, really intend to make themselves liable individually; but there is no testimony tending to show that their intention was ever communicated to the bank.

The court, over the objection of the defendants, gave the following instruction: "No. 3. The court charges you that if you find from the evidence that plaintiff held the notes sued on and offered to defendants to surrender the same for a new note to be signed by the defendant company and its directors, or some of them, and sent the defendants a note filled out to be executed and returned, and that defendants so changed the note and executed in form so that it was only the note of the defendant company, and presented the same to the plaintiff without calling plaintiff's attention to the changes, and that plaintiff, without observing or knowing that the note was signed only as the note of the company, surrendered the old notes, then such surrender of the old notes and acceptance of the new would not bind the plaintiff, and the title in the old notes and the right to recover thereon would remain in the plaintiff, and the new note would be void. If you find the foregoing facts by a preponderance of the evidence, you will find for the plaintiff."

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The point of the objection to this instruction is that it declares as a matter of law that Frazier's omission, when he presented the note, to call the attention of the cashier to the changes in the note and the different method of signing it from what had been called for, constituted a fraudulent misrepresentation which would avoid the acceptance of it by the bank; and that it permitted the jury to find for the plaintiff even though the cashier was guilty of negligence in failing to examine the paper before he accepted it.

While the question is not free from doubt, we are of the opinion that neither of these objections is well taken, for, if the facts recited in the instruction were found by the jury to exist with reference to the acceptance of the note, then the bank was not bound by its acceptance and had a right to rescind the contract and reclaim the surrendered notes. In other words, if the acceptance of the new note was made under circumstances recited in the instruction, the acceptance was made upon such a mistake of fact as would justify a rescission of the contract of renewal.

The following statement of the law taken from a decision of the Massachusetts court seems to be the one which should control in this case: "It is a general rule that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want of mutual assent necessary to create one; for in the case of a contract for the sale of personal property, if there is such a mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may, upon discovery of the mistake, return it and recover back the price which he has paid." Hecht v. Batchelor, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708. To the same effect, see Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433; Gardner v. Lane, 12 Allen (Mass.) 39; Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; McKinnon v. Volimar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; 1 Page on Contracts, § 74; Mechem on Sales, §§ 272, 842.

The principle is announced by the above authorities in cases of sale of chattels; but we perceive no reason why it should not be controlling in a case like this, where there is a delivery of a written instrument intended as a renewal of a former contract, and where it is accepted under a mistake as to its identity. It is clearly a case of mistake as to identity, if the facts are found to exist as recited in the instruction, for the cashier accepted under a mistake the note of the Sanders Company when he had called for and thought he was accepting the note of that company bearing the individual indorsement of the directors. The mistake therefore clearly involved the question of identity of the instrument accepted.

The argument of learned counsel for defendant is based upon a misconception as to the difference between reformation and rescission of a written contract on account of mistake of one of the parties. The difference is a very distinct one, for the reformation of a contract involves an effort to enforce it as reformed, whereas rescission involves an effort to abandon and recede from a contract which the party did not intend to make. One of the parties to a contract cannot have it reformed on account of mistake which is not mutual, for to do so would be to enforce the reformed contract which the other party had

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not intended to make. But a different question is presented where one of the parties to a contract seeks to have it rescinded because of a mistake on his part, for that makes only a case of there being no contract between the parties on account of the fact that there has not been a meeting of the minds of the contracting parties.

Nor does this violate the rule of evidence which forbids varying or contradicting the terms of a written instrument. The instrument did not become the evidence of the contract between the parties until it was accepted, and, if it was accepted by a mistake as to its contents, it constituted a mistake as to the identity of the subject-matter as much as if it had been the delivery of any article sold and purchased.

The decisions of this court in McIlroy v. Buckner, 35 Ark. 555, Colonial & U. S. Mortgage Co. v. Jeter, 71 Ark. 185, 71 S. W. 945, and other decisions of like import, holding that a party who signs a contract without reading it, when he has an opportunity to do so, cannot plead such ignorance in avoidance, have no application to the question now before us, for, when a written instrument is signed by the parties, it becomes the sole evidence of the contract between them and cannot be varied or contradicted by parol testimony nor reformed save upon clear and satisfactory evidence of a mutual mistake as to its contents. In the present case that question is not involved, because no rights are asserted under this contract, the instrument was not one to be signed by the accepting party, and it did not become the sole evidence of the transaction between the parties.

The question of negligence on the part of the cashier in accepting the new note and surrendering the old one without examining the former is not involved in this case, for the reason that there is no evidence to the effect that the makers or indorsers of the old notes were injured thereby. The element of estoppel on account of negligence could not arise unless the status of the parties had been changed to their disadvantage, and this does not appear in the case. We are therefore of the opinion that the instruction complained of was correct, and that the evidence warranted the finding for plaintiff in accordance with the law as therein declared.

The views already expressed dispose of the assignment of error relating to the court's refusal of the first instruction asked by the defendants.

It appears from the testimony that on one of the notes, after being signed by all of the directors including the secretary, and before its delivery to the cashier of the bank, the secretary added the abbreviation "Sec." to his name so as to show that he, as well as the president, had signed for the purpose of attesting the signature of the corporation. There is no evidence that the bank knew of this change in the note after it was signed, except that the word appeared in different ink from that of the original signatures. Be that, however, as it may, the testimony on the part of the secretary establishes the fact that he added the word pursuant to the common custom of signing the name of the corporation to add his own name as secretary.

An alteration made by one of the obligors before delivery to the obligee for the purpose of expressing the real intention of the parties does not avoid the contract. 1 Cyc. p. 148; Foote v. Hambrick, 70 Miss. 157, 11 South. 567, 35 Am. St. Rep. 631; Cole v. Hills, 44 N. H. 227.

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The mere fact that the abbreviation "Sec." was in different ink does not of itself make it a manifest or ordinarily observable alteration so as carry with it notice to one who afterwards accepts it; and there being no other evidence of notice to the bank that the word had been added, even if the alteration should be deemed material, it did not affect the liability of the other indorsers or makers of the note. State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880.

The court properly overruled the defendant's motion to transfer the case to the Chancery Court. The case, as already stated, does not involve the question of reformation of the instrument sued on, and no grounds are stated in the answer which would warrant the interposition of a court of equity.

Judgment affirmed.

Decision No. 1464.

HILL VENEER CO. v. MONROE.

(Circuit Court, M. D. Pennsylvania. August 7, 1911.)

189 Fed. 834.

SALES — RESCISSION.

Where a seller sold and shipped at different times eight car loads of veneer to a furniture company on credit, having been informed by the company before any sale that it was continuing its business only by virtue of an extension of time by its creditors, there was no such fraud or misrepresentation as entitled the seller to rescind the sale and reclaim the last car load, which was the only one unpaid for, on the appointment of a receiver for the purchaser.

The unconditional delivery by a seller of goods to a common carrier, to be transported and delivered to the purchaser, to whom the bill of lading was sent, constituted a delivery to the purchaser, which passed the title, even though the purchaser had not accepted the goods at the time a receiver in insolvency was appointed for it, who received them in its behalf.

A "sale" is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise.

In Equity. On petition by the Hill Veneer Company against W. R. Monroe, receiver of the Hawley Slate Furniture Company, to reclaim property. Petition denied.

Wm. Chrisman and Neil Chrisman, for petitioner.

A. W. Duy, for respondent.

WITMER, District Judge. The Hill Veneer Company, a corporation doing business at High Points, in the State of North Carolina, seeks to reclaim certain property delivered to the insolvent, the Hawley Slate Furniture Company, engaged in the manufacture of furniture at Bloomsburg, Pa., consisting of a car load of veneer.

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It appears that during the year eight car loads of drawer bottoms had been shipped by the veneer company to the furniture company. The proper credit was entered on each invoice, and all were paid but the last or eighth car. Before any credit was extended, the veneer company caused inquiry to be made concerning the financial standing of the furniture company, resulting in an unfavorable report. The furniture company furthermore reported, frankly admitting, amongst other things, that it was working under an extension of time granted by its creditors, and offering as reference a person alleged to be its largest creditor, having no interest in the concern other than as a creditor. The veneer company also obtained a similar report from its authorized agent, who sold the furniture company the first order of lumber after his investigation.

The information to hand was sufficient to aid any discreet business man to a proper conclusion. If not, it was at least sufficient to have put the veneer company upon further inquiry, if anything additional was needed, which could have been readily ascertained by following the direction of the furniture company's letter. There is no allegation that any false representations were made by the furniture company in this or any other letter written by it. Neither is it charged that it in any wise misrepresented its true financial status. This the veneer company, no doubt, well understood at the time it opened its account and took chances; and it is not now sufficient, after having to a large extent succeeded, for it to say that the insolvent should have continued to keep it informed of its financial doings. Such information could have been ascertained, no doubt, upon proper inquiry, had the veneer company been diligent as bound under the circumstances.

At the time the first credit was extended, the veneer company was aware of the fact that the furniture company was doing business by virtue of an extension offered by its creditors, and that, if a renewal of such extension should be refused, the business could not be continued; but it chose to extend its credit, and therefore assumed the risk of loss, and is now in no better position than the other creditors.

"Buyer and seller under ordinary circumstances deal at arm's length. On one hand, the rule is caveat emptor; while, on the other, the buyer is not bound to disclose his pecuniary condition or his ability to pay. A man has a right to take chances, and to be sanguine as to his affairs; hence the law of most commercial States holds that even insolvency, although known to the buyer at the time of the purchase, need not be disclosed,and the concealment of it, by mere silence, without any active misrepresentation, is not such fraud as will avoid the sale."

"To constitute legal or constructive fraud, such as to entitle the vendor to rescind the contract of sale and reclaim the goods, there must be something more than the mere insolvency of the vendee and the knowledge upon the part of the vendee that he is insolvent. There must be a withholding of that knowledge from his vendor, and a resort to trick, artifice, false representation, or such conduct as reasonably involves a false representation." Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51; Bughman v. Central Bank, 159 Pa. 94, 28 Atl. 209; Smelting Co. v. Temple, 12 Pa. Super. Ct. 99.

In the absence of circumstances which tend to show trick, artifice, false representation, or, in the language of Smith v. Smith itself,

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"conduct which reasonably involves a false representation," there has not been sufficient shown to take the case out of the rule of the authorities cited.

But it is argued that even if there was no fraud or deception, which might have induced the shipment, the title of the property had not passed, either to the insolvent or its receiver, and that the petitioner is now only seeking to recover its own property. The order was given November 26, 1910, and delivered into the hands of the common carrier, in North Carolina, December 31, 1910, and the bill of lading at once forwarded to the purchaser. The lumber arrived at Bloomsburg, Pa., on or about January 13, 1911, but was not accepted by the consignee, in order that the consignor might be enabled to "receive the full amount on invoice." The receiver, however, appointed January 19, 1911, paid the freight, and accepted the goods, and appraised it as part of the assets of the estate.

A sale is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise. In the present case there was no different intention or agreement, expressed or implied. The sale was unconditional. There is no doubt that the delivery to the common carrier of the property in question was a delivery to the purchaser. All the requisites of a delivery were observed, whether determined by the law of Pennsylvania or North Carolina. The conclusion is the same.

Following a long line of cases, in Phila. & C. R. Co. v. Wireman, 88 Pa. 264, it is decided that:

"Where goods are left with a common carrier, to be delivered to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them."

It is held in Ober v. Smith, 78 N. C. 313, and again confirmed in Hunter v. Randolph, 128 N. C. 91, 38 S. E. 288, that:

"Where goods are left with a common carrier, to be delivered to the consignee, without any qualification or restriction, the consignor parts with the goods and all control over them, and the passage of title is not prevented by failure of the vendor to send the vendee a bill of lading."

But it is not necessary to resort to the law as laid down by the State courts for authority respecting the delivery of the lumber in dispute since it is said (In re Hess, 14 Am. Bankr. Rep. 642):

"It has been established by numerous decisions that, in finding upon a question of common law and not of statute, the United States court will not be bound by State decisions."

The Supreme Court of the United States, in an opinion delivered by Justice White in U. S. v. R. P. Andrews & Co., 207 U. S. at page 240, 28 Sup. Ct. at page 104 (52 L. Ed. 185), says:

"That as a general rule the delivery of goods to a common carrier for account of a consignee has effect as delivery to such consignee is elementary. That where a purchaser of goods directs their delivery

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for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question. Certain, also, is it that, on the delivery of goods to the consignee or his order, the acceptance by the consignee of such bills of lading constitutes a delivery."

And it is not inconsistent with a proper delivery that the carrier has not been designated by the purchaser, but it is sufficient that the goods have been delivered to the carrier usually employed in the transportation of the goods from the place of the seller to that of the purchaser, as was done in the present instance.

True, the purchaser refused to receive the goods when they arrived, with the manifest intent of returning the goods to the vendor, so as to prevent any loss of the price to the consignor. This was done without any actual intent to defraud any one, but with an honest desire to protect the vendor. This action was not, however, communicated to it, and the contract could only be rescinded, altered, or revoked with its consent, no matter what action the vendee might have taken. A contract is always mutual between the parties, and one cannot in any manner revise a mutual contract without the actual or implied consent of the other. But the purchaser had a right to change its mind in this respect, at any time before communicating its intentions to the vendor. This was done by the receiver, who succeeded to all the rights of the insolvent company. Moreover, the proposed action for the return of the lumber would never have been thought of, had the creditors not refused an extension and thus postponed the receivership proceedings. It undoubtedly would have been accepted and used in conducting the insolvent's business.

Even if the refusal to receive the goods had been communicated to the consignor and been agreed to by it, the transaction would have been in fraud of creditors, and could not have been enforced. The drawer bottoms, being at that time the property of the furniture company, which was insolvent and about to fall into the hands of a receiver in pursuance to proceedings instituted in court by its certain creditors, were a part of the assets of the estate. Had the insolvent caused the return of the disputed goods to the vendor, it would have unconsciously committed a fraud by creating an unlawful preference.

The petition is therefore denied.

Decision No. 1465.

TICHNOR BROS., Inc., v. BARLEY.

(Nassau County Court. June, 1911.)

132 N. Y. Sup. 243.

SALES — WARRANTY.

It being implied as a part of an executory contract of sale that the goods will be of merchantable quality, if they are not, the purchaser has a right to rescind.

On the failure of a buyer to return or offer to return the goods, it will be conclusively presumed that the goods were fit and suitable, or, at least that he was satisfied with their quality.

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Where a buyer on rescinding a contract of sale makes his offer to return the goods subject to the condition that the seller shall reimburse him for express charges paid, there is no valid tender, and hence no rescission of the contract.

Appeal from Justice Court.

Action by Tichnor Bros., Incorporated, against Samuel M. Barley. From a judgment for defendant, plaintiff appeals. Reversed.

Lincoln B. Haskin, for appellant.

R. & A. H. Seabury, for respondent.

NIEMANN, J. This is an appeal by the plaintiff from a judgment of a justice's court rendered by the justice in favor of the defendant. The action was brought to recover $37.50 for 6,000 postal cords at $7.50 per 1,000, ordered by the defendant from the plaintiff. The goods were shipped by the plaintiff to the defendant from Boston by express, and, when received, were found to be defective. A correspondence ensued between the parties in which the plaintiff admitted that the said cards were defective, in that the colors were run wrong, and offered to either allow the defendant a reduction of fifty per cent. on the purchase price, if he would retain the goods, or to correct such subjects as defendant could not use; but the defendant did not accept said proposition. He wrote the plaintiff, in substance, that he would not keep the goods, and offered to return the same if two dollars which he had paid for express charges on the goods was refunded. Upon the trial the defendant claimed that he had actually returned the goods by delivering them to an express company, consigned to the plaintiff at Boston, Mass. No positive testimony, however, was given on the part of the defendant that the said goods were delivered by him or on his behalf to an express company for transmission to the plaintiff. The defendant testified on this subject as follows:

Cross-examination:

"I returned goods to express company with instructions to return to manufacturer. The manufacturer's address was on goods when left at express office. I don't remember if I took receipt. I have none with me."

Redirect:

"I delivered them to express company wagon myself, if my memory serves me correctly. I have a clerk. That is my impression. Q. Then your testimony that you delivered the goods to the express company is based wholly on your impression? A. Yes."

The contract of sale in this case was executory, and it was implied as a part of the contract that the goods would be of merchantable quality, and, if they were not so, the defendant had a right to rescind the contract by returning or offering to return the goods; and, failing to do this, it would be conclusively presumed that they were fit and suitable or at least that he was satisfied with their quality. Hargous v. Stone, 5 N. Y. 73; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Mason v. Smith, 130 N. Y. 480, 29 N. E. 749.

In the case of Mason v. Smith, supra, Judge Haight states the rule applicable to such a case as this, as follows:

"The contract for the sale and delivery of the gloves was executory. It became the duty of the defendants on the arrival of the goods, or

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within a reasonable time thereafter, to examine them and determine whether or not they were of the kind and quality ordered, and, if they were found not to comply as to quality or kind, to promptly rescind the contract, and either return or offer to return the goods to the plaintiffs. Reed v. Randall, 29 N. Y. 358 [86 Am. Dec. 305]; Gaylord Manufacturing Co. v. Allen, 53 N. Y. 515; Coplay Iron Co. v. Pope, 108 N. Y. 232 [15 N. E. 335]."

"The rule requiring a return or offer to return under an executory contract of sale is inflexible." Per Houghton, J., in Cooper v. Payne, 103 App. Div. 118, 122, 93 N. Y. Supp. 69.

There being no evidence in the case sufficient to authorize a finding of fact that the defendant actually returned the goods, the question remains whether the offer as made by him to return the same was sufficient to constitute rescission. In a letter written by the defendant to the plaintiff under date of January 15, 1910, he said: "'When you send amount to cover express, I will ship goods back to you;" and in a letter dated January 21, 1910, he wrote: "Send me back express charges and I will return same," and in a letter written on the bottom of plaintiff's letter, dated January 26, 1910, he wrote: "When you send amount to cover express, I will return the cards;" and in a letter written on the bottom of plaintiff's bill dated March 1, 1910, defendant wrote: "When you send amount to cover express we will be only too glad to return this invoice of goods." The defendant testified as to holding the goods for payment of the express charges, as follows:

"Q. In your letter contained in plaintiff's Exhibit E, what do you mean by the expression, 'When you send amount to cover express, I will ship goods back to you?' A. I paid the express, about two dollars; at least my clerk did in my absence. As goods were of no value to me, I wanted express charges returned."

The question then arises whether the condition annexed by the defendant to his tender or offer to return the goods, to wit, that plaintiff first refund to him the said sum of two dollars paid for express charges, destroyed the tender. He said in his letters. and testified, that he would not return the goods except upon condition that the plaintiff would reimburse him the two dollars expressage. This did not constitute a valid tender. Howard v. Hayes, 47 N. Y. Super. Ct. 89, affirmed without opinion, 90 N. Y. 643; Gould v. Cayuga Co. Nat. Bank, 86 N. Y. 75; Bridge v. Penniman, 51 N. Y. Super. Ct. 183, affirmed 105 N. Y. 642, 12 N. E. 19.

In the above case of Howard v. Hayes the plaintiff agreed to make, for defendant, a machine capable of performing certain work for a certain price; and it was claimed by the defendant that the machine, which was delivered, was not capable of performing the designated work. In that case, as in this, there was no special warranty, outside of the warranty implied by law that the article would be fit and merchantable; and it was held that the defendant was not bound to accept the machine unless it met these conditions, but that he was to determine this upon the receipt of the property, and that. unless he returned or offered to return it after a reasonable time for examination, he waived all imperfections and objections, and that he could annex no conditions to the return or offer to return. Judge Speir wrote as follows upon this point:

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"He did not return it nor offer to return it except upon condition that the plaintiff would pay him $300 without prejudice to any suit. To make a valid tender, it must be made without the imposition of any condition, restriction, or qualification. Roosevelt v. Bull's Head Bank, 45 Barb. 579; Wood v. Hitchcock, 20 Wend. 47. A party who seeks to rescind a contract must rescind in toto, and place the opposite party in the position he was in before the contract was made. If the defendant did not accept the performance tendered by the plaintiff, the burden rested upon him to show a return or offer to return the machine. This he not only failed to do, but testified himself to the contrary."

The question is not whether the condition attached by the defendant is fair and reasonable, but whether the tender itself was absolutely unconditional. In the case of Wood v. Hitchcock, supra, cited by Judge Speir, Cowen, J., said:

"It is not of the nature of a tender to make conditions, terms, or qualifications. . . . Interlarding any other object will always defeat the effect of the act as a tender. . . . The books are sufficiently nice as to the manner of a tender. . . . The person making the tender may avoid all implication against the idea of a qualification, or other circumstances destroying his tender, by making it in writing, and even negativing that it is on any condition, or reserve, or intended to prejudice the plaintiff's further claim. Considering the exactness of the cases, and the chances to infer something against the defendant from the cross-examination of the tendering witness, Mr. Chitty advises to that course, with other cautionary steps in this respect. He goes so far as to give the form of a notice, which shall disembarrass the proceeding of all the clogs imposed by the cases."

There is a class of cases where a tender may be restricted by such conditions as by the terms of the contract are conditions precedent or simultaneous to the payment of the debt or proper to be performed by the party to whom the tender is made. These cases are reviewed and discussed by Brown, J., in Halpin v. Phenix Ins. Co., 118 N. Y. 165, 176, 23 N. E. 459, but the condition which the defendant affixed to his tender was not of such a character as would be permissible under the exceptions to the rule that a tender must be unconditional laid down by the above cases. The defendant's remedy was to return or offer to return unconditionally the goods and then sue for the money expended by him for expressage. Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 258. He could not, without destroying his tender, hold the goods as security for the repayment of this expenditure, any more than he could hold the goods for repayment of the purchase price. The payment by the defendant of the express charges upon receipt of the goods is analogous to the payment in advance of delivery of the purchase price, or of freight charges, or custom duties, in any of which cases the vendee could not annex to his tender as a condition the repayment to him first of the money. In any of such cases he would first have to return or offer to return the goods unconditionally, and thereby rescind, and then sue for his damages; i. e., payments made by him either by way of purchase price, or advances, or charges. Pierson v. Crooks, supra; Taylor v. Saxe, supra; Coplay Iron Co. v. Pope, supra.

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There is also an exception presented which is entitled to consideration. Upon the question whether the defendant actually returned the goods, the only testimony was that before quoted to the effect that it was his impression that he had returned the same. The plaintiff's counsel moved to strike out this testimony upon the ground that the defendant's mere impression was not evidence of the fact sought to be established, which motion was denied and an exception taken thereto by the plaintiff. I think that the justice erred in refusing to strike out this testimony; and, as this testimony is the only evidence in the case given to establish the defense of rescission, the error is material.

The defendant's own letters and testimony showed that he refused to return the goods unless he received two dollars expressage. The justice permitted the said incompetent testimony that the defendant had actually returned the goods to stand, against a motion to strike out the same. In view of the value placed upon this evidence by the justice, as is shown by his retaining it in the case after reserving his decision on the motion made by the plaintiff to strike it out, it may very well be assumed that he relied upon this testimony and rendered judgment in favor of the defendant upon the assumption that the defendant actually returned the goods, and had therefore discharged his duty to the plaintiff, and thus brought about an actual rescission of the contract. Indeed, the justice could base his judgment for the defendant only upon one of two grounds — tender, or actual return of the goods. As there was no valid tender or offer to return the goods, the only ground upon which the judgment could be sustained would be that there was an actual return of the goods, which the justice was not authorized to find upon the said evidence. The error committed by the justice in refusing to strike out this evidence, being substantial and prejudicial to the plaintiff, cannot be disregarded by force of the provision of section 3063 of the Code of Civil Procedure that, in an appeal from a Justice's Court, "the Appellate Court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits."

My conclusion is that the plaintiff is entitled to a reversal of the judgment appealed from. Inasmuch as this reversal is upon questions of law, the reversal must be absolute; and the court has no power to order a new trial in the Justice's Court. Such disposition can be made only where the judgment is contrary to or against the weight of evidence. Nor has this court discretion over the costs. They are regulated by statute. Code Civ. Proc., § 3066, subds. 3, 4; Id., § 3067; Robischon v. Moore, 135 App. Div. 699, 119 N. Y. Supp. 252.

Judgment reversed.

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Decision No. 1466.

FRANCIS v. RYCROFT.

(Supreme Court, Appellate Division, First Department. December 1, 1911.)

132 Sup. 14.

LIMITATION OF ACTIONS.

Where a conditional promise is relied on to avoid a plea of limitations, performance of the condition must be shown, whether the promise is made before or after the statute has run.

A promise by a debtor to pay a debt when her father's estate is settled, if constituting an acknowledgment of the debt to avoid the defense of limitations, is conditional on the settlement of the estate, and mere proof that the debtor has received from her father's estate a sum sufficient to pay the debt, in the absence of evidence of the amount of the bequest to her, is not proof of performance of the condition, and the defense of limitations is not avoided; the word "settlement" involving a finality, and to "settle" a debt meaning to discharge it.

Appeal from Trial Term, New York County.

Action by George B. Francis, Jr., against Alice Griffith Rycroft. From a judgment for plaintiff on a verdict directed by the court, and from an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and CLARKE, SCOTT, MILLER, and DOWLING, JJ.

Warren McConihe, for appellant.

Thomas W. Churchill, for respondent.

MILLER, J. The plaintiff, the assignee of the executors of one John Rycroft, deceased, sues to recover the amount of several alleged loans, made by the said testator to the defendant between May 11, 1900, and October 3, 1900, aggregating £205, with interest. The defendant was the daughter-in-law of the said John Rycroft, and the several sums in question were advanced in amounts varying from £5 to £60 to defray the expenses of the defendant and her daughter, who were then traveling in Europe. The letters written to the defendant by her father-in-law tend to indicate that he intended either to give said amounts to her or to debit them to her husband. The defendant, however, gave back receipts in each case, in which she promised to repay the sum advanced "at some future time," and the subsequent correspondence between the parties shows that both treated the advances as loans to the defendant.

The action was begun by the voluntary appearance of the defendant on November 19, 1907. The defendant pleaded the statute of limitations. To avoid that plea, the plaintiff relies upon a subsequent written acknowledgment and promise to pay. On the 10th of March, 1902, the defendant wrote to her father-in-law, and in the course of the letter said:

"You can rest assured of one thing: When the estate is settled, I will pay you at once what I personally owe you. . . . Was not the

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least surprised at your dunning letter, notwithstanding I have told you many times I would pay you when my father's estate was settled."

And on July 2, 1903, she wrote another letter, in the course of which she said:

"What you advanced to me personally I have always told you that I intended to pay you just as soon as my father's estate is settled, which will be very soon."

Assuming, without deciding, that those statements constituted a sufficient acknowledgment of the debt, the promise to pay was conditional; and it is well settled that, where a conditional promise is relied upon, performance of the condition must be shown, whether the promise be made before or after the statute has run. Dean v. Hewit, 5 Wend. 257; Tompkins v. Brown, 1 Denio, 247; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Brooklyn Bank v. Barnaby, 197 N. Y. 210, 90 N. E. 834, 27 L. R. A. (N. S.) 843.

The plaintiff rested, without attempting to prove that the father's estate had been settled, whereupon the learned trial court correctly ruled that it was necessary for the plaintiff to prove the happening of the condition, and dismissed the complaint. The plaintiff was then allowed to reopen the case, and to call the defendant as a witness to prove the happening of the condition. She testified that her father died May 19, 1900, that his estate had not been and could not be settled, as she understood it, until the death of her brother; that she had received from the executors some amount between $1,000 and $2,000; that, when she made the conditional promise relied upon, she had in mind the settlement of the estate upon the death of her brother, who was suffering from a chronic malady, as her father-in-law knew. It did not appear, and no attempt was made to show, under what circumstances the father's executors had advanced money to the defendant, and no attempt was made to show that there had ever been any accounting by them or judicial settlement of their accounts. However, at the close of the entire evidence, the court directed a verdict for the plaintiff, evidently upon the theory that the happening of the condition was shown by proof that the defendant had received a sufficient sum from her father's estate to pay the claim in suit, though she testified that the entire amount received by her was used in the payment of other debts of her deceased husband.

So far as the defendant is concerned, her father's estate will not be settled until there is either a judicial settlement and a decree for distribution and the payment to her of her share, or at least until the executors, without a judicial settlement, pay the share of the estate bequeathed to her by her father. There is nothing in this record to show the amount of the estate or the amount bequeathed to the defendant. As commonly understood, the word "settlement" involves a finality. To "settle" a debt means to discharge it. Part payment does not amount to a settlement, unless the debt is discharged. The defendant did not say that she would pay as soon as she received a sufficient sum from her father's estate, and therefore the mere proof that she had received enough to pay the amount sued for did not satisfy the condition. Doubtless the statute does not commence to run against the new promise until the happening of the condition, but the plaintiff cannot rely upon the promise to avoid the plea of the statute in a suit on the original indebtedness without proving the hap-

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pening of the condition; i. e., that as to the defendant her father's estate has been settled by the payment to her of her distributive share, or of the amount bequeathed to her.

The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event. All concur.

Decision No. 1467.

WESTERN UNION TELEGRAPH CO. v. FULLING. (7,440.)

(Appellate Court of Indiana, Division No. 1. January 4, 1912.)

96 N. E. 967.

SUNDAY.

The sending of a telegram by a husband to his wife, notifying her that he would not return as expected, is a "work of necessity," within Burns' Ann. St. (Ind.) 1908, § 2364, prohibiting any work on Sunday, save that of charity and necessity.

A contract, entered into by a telegraph company, on Sunday, to transmit a necessary message, is only voidable, and advantage of that defense may be had only by answer.

In an action against a telegraph company for failure to promptly deliver a message sent on Sunday, a general finding for plaintiff is equivalent to a finding that the contract was not in violation of Burns' Ann. St. (Ind.) 1908, § 2364, prohibiting ordinary labor on Sunday.

Appeal from Circuit Court, Warrick County; Roscoe Kiper, Judge.

Action by Henry F. Fulling against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. H. Fearons, Hatfield & Heminway, and J. E. Williamson, for appellant. R. S. Moore, for appellee.

MYERS, J. Appellee brought this action against appellant to recover a statutory penalty (Acts 1885, p. 151) for the latter's alleged breach of duty.

Issues were formed and submitted to a jury, resulting in a verdict and judgment in favor of appellee for $100. With their general verdict, the jury returned answers to interrogatories. A demurrer to the complaint for want of facts, and appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict, were each overruled, and these rulings are made the basis for separate assignments of error. Both of these assignments present the same and only question for our consideration.

The complaint shows that on September 8, 1907, the telegram in question was delivered by appellee to appellant at Terre Haute, Ind., to be sent to the former's wife at Boonville, Ind. Among other facts, the complaint alleges that appellee, on said day, at the city of Terre Haute, Ind., informed appellant that he desired to send a message over its lines and wires to his wife in Boonville, Ind., if the same could be delivered to her that same day or evening, and if it could not

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be delivered on that day or evening he did not want to send it at all, for, unless it was delivered on that day, it would be useless to send it; that appellant then and there informed appellee that the message could and would be delivered on that day, whereupon appellee then and there prepared and delivered to appellant, charges demanded prepaid (omitting the name and address of sendee and sender), the following message: "Late trains prevent being home till morning." It is also alleged that appellant negligently failed to transmit said message with impartiality and in good faith, nor in the order of time in which it was received, etc. The answers to interrogatories show that said September 8th was Sunday.

Appellant contends that it did not incur the penalty for its failure to transmit the message, because the contract was made on Sunday, unless a necessity existed for its transmission on that day and that it had notice of such necessity. It appears from the complaint that the message in question was delivered to appellant on September 8, 1907, for transmission on that day, and this court judicially knows that September 8, 1907, was Sunday. Roberts v. Farmers' & Merchants' Bank, 136 Ind. 154, 36 N. E. 128.

From the facts exhibited by the complaint, appellee clearly gave appellant to understand that transmission and delivery of the message on the day mentioned was essential; otherwise the sending of the same would be useless. With that understanding, appellant took appellee's money, received the message, but failed to transmit and deliver it "with impartiality and in good faith, and in the order of time in which it was received." Appellee's conversation with appellant, and the contents of the message, would certainly convey to the mind of an ordinary person the cause of appellee's delay in arriving home, and under the circumstances was important. It was a word from the husband to the wife. Its tranquil effect on the mind of the wife for the unexplained delay of the husband's arrival home is apparent, and of itself sufficient to prompt a considerate husband in sending the message. If this only was its purpose, the necessity is shown (Burnett v. Western Union Tel. Co., 39 Mo. App. 599); and appellant in accepting it, and in undertaking to deliver it, did not in any wise make it amenable to the statute (section 2364, Burns 1908) which it now seeks to use as a shield in avoiding liability for a failure to perform a statutory duty. Section 5780, Burns 1908. The contract in question, although made on Sunday, was merely voidable (Western Union Tel. Co. v. Eskridge, 7 Ind. App. 208, 33 N. E. 238; Heavenridge v. Mondy, 34 Ind. 28), of which advantage may be taken only by answer. Western Union Tel. Co. v. Eskridge, supra; Heavenridge v. Mondy, supra.

Appellant, in this case, by way of an affirmative answer, sought to take advantage of the fact that the contract was made on Sunday, and that there was no such necessity for the transmission of the message on that day as would take the contract out of the operation of the statute. The general verdict of the jury amounted to a finding against appellant on this question. Having determined that the contract was not in violation of section 2364, supra, for aught that appears, it was the duty of appellant to transmit and deliver the message in question on the day or evening it received the same; and its failure so to do made it liable for the statutory penalty (section 5781, Burns 1908),

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upon the charge of "negligent failure to transmit the message in order of time in which it was received." Western Union Tel. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679; Western Union Tel. Co. v. Braxtan, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co. v. Sefrit, 38 Ind. App. 565, 78 N. E. 638.

Judgment affirmed.

Decision No. 1468.

WORLD'S DISPENSARY MEDICAL ASS'N v. PIERCE.

(Court of Appeals of New York. November 28, 1911.)

96 N. E. 738.

TRADEMARKS AND TRADE NAMES.

Unlawfulness, arising from a corporation practicing medicine, does not preclude it from enjoining unfair competition in a separate enterprise for the manufacture and sale of propretary medicines.

One is not entitled to sell his products or goods as those of another by means of unfairness, artifice, misrepresentation, or fraud.

Defendant will be enjoined from using the words "Dr. Pierce," or the word "Pierce," without prefixing his Christian name or the initials, in advertising, labeling, etc., proprietary medicines, where otherwise his remedies would be confused in the public mind with those of a long-established and well-known competitor, and where defendant is not a licensed physician; but he may use his own name, if deception be obviated.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the World's Dispensary Medical Association against Robert J. Pierce. Judgment of the Appellate Division (138 App. Div. 401, 122 N. Y. Supp. 818), affirming a judgment for plaintiff, and defendant appeals. Modified and affirmed.

See, also, 137 App. Div. 881, 123 N. Y. Supp. 1151.

David M. Dean, for appellant. Joseph H. Morey, for respondent.

COLLIN, J. The action is to restrain unfair competition in the use of trade names. The plaintiff was incorporated in 1879 under chapter 40 of the Laws of 1848 and the acts amendatory and supplemental thereto. The amendatory act, chapter 838 of the Laws of 1866, authorized an incorporation "for the purpose of carrying on any kind of manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative business." The objects for which the plaintiff was incorporated were "the manufacturing, compounding and vending of medicines, consultation and operating in surgery, consultation and prescribing, furnishing and administering medicines and other curative and hygenic agents for invalids and furnishing care, attendants and home accommodations for the same." One Ray V. Pierce, a physician, transferred to the plaintiff upon its incorporation his business of manufacturing and selling under their trade names proprietary remedies and conducting a private hospital

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and medical practice. The proprietary remedies which the plaintiff manufactures and sells are named "Dr. Pierce's Golden Medical Discovery," "Dr. Pierce's Favorite Prescription," "Dr. Pierce's Pleasant Purgative Pellets," "Dr. Pierce's Compound Extract of Smart Weed or Water Pepper," "Dr. Pierce's Lotion Tablets," "Dr. Pierce's Cough Syrup," "Dr. Pierce's Ammonio Camphorated Liniment," and "Dr. Pierce's Medicated Soap," which are commonly known to the public as "Dr. Pierce's Remedies," and also as "Pierce's Remedies." Ray V. Pierce has been at all times and is now the president and a director of the plaintiff, and devised the formula for each remedy. The lotion tablets are sold in boxes, having upon their tops the words "Dr. Pierce's Purifying and Strengthening Lotion Tablets, World's Dispensary Medical Association, Props., Buffalo, N. Y.," and elsewhere the words "Dr. Pierce's Genuine Family Medicines," together with a fac simile signature of Ray V. Pierce, to wit: "R. V. Pierce, M. D." A part of the business of the plaintiff has been and is carrying on the hospital and medical practice founded by Ray V. Pierce. The plaintiff's remedies have become widely and favorably known, and have an extensive sale throughout the United States and elsewhere.

The defendant, since some time after 1899, has advertised and sold a certain proprietary remedy in the form of tablets under the name of "Dr. Pierce's Tansy, Cotton Root, Pennyroyal and Apiol Tablets," which are put up in boxes having on their tops the words "Dr. Pierce's Empress Brand Tansy, Cotton Root, Pennyroyal and Apiol Tablets," and elsewhere the words, "Dr. Pierce's Empress Brand," and the words "The genuine has signature on box R. J. Pierce"; the words "R. J. Pierce" being a fac simile signature. He is selling also another proprietary remedy known as "Pierce's Empress Brand Pennyroyal Tablets" in boxes having upon their tops those descriptive words and elsewhere the words "The genuine has the signature on box R. J. Pierce," the words "R. J. Pierce" being a fac simile signature. The defendant is not a licensed physician, nor entitled to practice as such under the law of the State. The trial court found as facts that the use by defendant of the words "Dr. Pierce" is unlawful; that the names and labels used by defendant are calculated and designed to cause the public to believe that the defendant's remedies are manufactured and sold by plaintiff, and confusion between the business and remedies of the parties will be created by their continued use; and as conclusions of law that the defendant, in using the names designating his remedies, is unfairly competing with the plaintiff, and that by a judgment the defendant be forever restrained from using in conection with his remedies those names or the words "Dr. Pierce" or "Dr. Pierce's," or any name which includes the word "Pierce" or "Pierce's," in such manner as to be calculated or designed to cause the purchasers of his remedies to believe them to be manufactured or sold by the plaintiff, or the word "Pierce" or "Pierce's" in connection with his business in such manner as to deceive or be calculated to deceive the public or the customers of either of the parties. The judgment of the Special Term was unanimously affirmed.

The principal contention of the defendant is that the plaintiff cannot lawfully practice medicine and conduct the hospital because it is

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a stock corporation (see People v. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697), and that the judgment protects its use of the trade name "Dr. Pierce" in its illegal practice, and, therefore, violates the rule that a plaintiff who does not come into a court of equity with clean hands is refused relief (Prince Manfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; N. Y. & N. J. Lubricant Co. v. Young, 77 N. J. Eq. 321, 77 Atl. 344). A majority of the court do not think it necessary, under the findings of the trial court, to consider and decide whether or no the plaintiff is violating the law of the State by practicing medicine and conducting the hospital. They are of the opinion that, even if it should be held that it is violating the law in this respect, it would not thereby be debarred from protection, otherwise proper, in respect of its manufacture and sale of proprietary remedies which are entirely separate from and in no manner connected with the practice of medicine. The minority of the court, of whom the writer of this opinion is one, do not assent to the view of the majority, but refrain from an unavailing discussion. The court, therefore, leaves unconsidered and undetermined the question, pressed upon us by the appellant, whether the plaintiff may lawfully practice medicine and conduct a hospital. No other contention of the appellant warrants the reversal of the judgment.

Appellant's contention that the judgment is too broad and drastic is well founded. Its restraint of the defendant from the use in any way of the designations "Dr. Pierce" or "Dr. Pierce's" is legal and just, because he is not a licensed physician, nor entitled to practice under the law of the State. Public Health Law (Consol. Laws 1909, c. 45) §§ 161, 174. The defendant has, however, the right to use his own name in his own business. It is a general principle of law that one's name is his property, and he has the same right to its use and enjoyment as he has to that of any other species of property. Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. It is, however, also a general principle of law that no man has the right to sell his products or goods as those of another. He may not, through unfairness, artifice, misrepresentation or fraud, injure the business of another, or induce the public to believe his product is the product of that other. The law protects the honest dealer in the business which fairly is his, and the public from deception in trade. In this case, as in others which have been before the courts, these principles must, because of the identity in the surname of the defendant and the trade name used by the plaintiff be reconciled and amalgamated. The plaintiff and its predecessor, Dr. Pierce, solely through a long period prior to 1899 associated the name "Pierce" with the proprietary remedies sold by it, and which had acquired a high reputation and an extensive market. The name designates and causes the public to buy the remedies with which it is associated as those of the plaintiff. It, when associated with the defendant's remedies, is "calculated and designed to deceive and defraud the public, and the buyers and users of the plaintiff's proprietary remedies and tablets." The defendant has the right to use his name. The plaintiff has the right to have the defendant use it in such a way as will not injure his business or mis-

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lead the public. When there is such a conflict of rights, it is the duty of the court so to regulate the use of his name by the defendant that, due protection to the plaintiff being afforded, there will be as little injury to him as possible. Defendant should so use his name in connection with his remedies that he will obviate deception, or with an explanation which will inform or be a notice to the public that those remedies are not those of plaintiff. Herring-Hall-Marvin Safe Co. v. Hall's Safe Company, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616; Devlin v. Devlin, 69 N. Y. 212, 25 Am. Rep. 173; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489.

We have already stated that the defendant cannot use his name with the prefix "Dr." We have concluded that due and adequate protection will be afforded to the plaintiff and the public if the defendant is enjoined additionally from using the words "Pierce" or "Pierce's" in advertising, describing, designating, labeling, or selling his proprietary remedies, unless said word be immediately preceded on the same line therewith by defendant's first or proper Christian name and his middle name or the initial letter thereof in letters identical in size, color, style of type, and conspicuousness with those of said word, so that said word shall not appear for any of the purposes aforesaid, except when thus conjoined with the words "Robert J." or "Robert," followed by the middle name of the defendant.

The judgment should be modified, so that the restraining part thereof will provide: "Adjudged that the defendant, his servants, agents, and employees, be forever enjoined and restrained from putting up, selling, advertising, or offering for sale any tablets, proprietary remedy, or product, manufactured by or for the defendant, under any name having the words 'Dr. Pierce' or the words 'Dr. Pierce's' as a part thereof, or in boxes or packages having upon them or bearing labels having upon them any name having the words 'Dr. Pierce' or the words 'Dr. Pierce's' as a part thereof, and from using the words 'Dr. Pierce' or the words 'Dr. Pierce's' in the business of defendant, and from using the word 'Pierce' or the word 'Pierce's' in advertising, describing, designating, labeling, or selling the tablets or proprietary remedies manufactured and sold by or for the defendant, unless said word be immediately preceded on the same line therewith by the defendant's first or proper Christian name and his middle name or the initial letter thereof in letters identical in size, color, style of type, and conspicuousness with those of said word, so that said word shall not appear for any of the purposes aforesaid, except when the words 'Robert J.' or 'Robert' immediately followed by the middle name of the defendant in the form hereinbefore provided are conjoined with it." And the judgment, as thus modified, should be affirmed, without costs to either party.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and HISCOCK, JJ., concur. WILLARD BARTLETT, J., votes for reversal.

Judgment accordingly.

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Decision No. 1469.

McHENRY v. OLD CITIZENS' NAT. BANK OF ZANESVILLE.

(Supreme Court of Ohio. December 12, 1911.)

97 N. E. 395.

ESTOPPEL — CHECKS — BANKS AND BANKING.

The rule that, where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong, must bear the loss, applies to a case where one gives a bank check to a person to whom he has loaned money and taken to secure the same a mortgage on land represented by such person as owned by him and believed by the drawer of the check to be so owned, though in fact not owned by him, and the bank, relying upon the same means of identification of the payee of the check as was relied upon by the drawer, and with no reason to suspect the bona fides of the transaction, pays the check to the identical person to whom the drawer intended to and did deliver it, although not to the person who in fact owned the land attempted to be mortgaged.

One W. accompanied a stranger to the office of M., and introduced him as G. T., who wanted to procure a loan of money. M. had been acquainted with W. for some time, having had business transactions with him. The stranger asked to borrow $3,000, and represented himself as the owner of a farm near Otsego, Ohio, on which he would give a mortgage to secure the loan. M., having examined the county records as to the title to the land, and having found it standing in the name given as that of the person so introduced, and clear of incumbrance, caused notes and a mortgage to be drawn, which, being executed by the stranger under the name of G. T., were delivered to M. Thereupon M., without taking further means of identifying the stranger, or to learn whether he was in fact the person of that name who owned the land, delivered to him a check on a nearby bank where M. had deposits subject to check. The check was, the next day after its date, presented by the stranger, the one to whom it had been given by M., indorsed by that person and by W., to the bank and by it paid to such person, the bank having no ground of suspicion as to the bona fides of the transaction, and relying upon the identification by W. The person who thus figured in the transaction as G. T., and received the money on the check, was not in fact the owner of the land, but an imposter.

Held that, although M. was mistaken and deceived in the transaction, yet, inasmuch as the person he dealt with was the person intended by him as the payee of the check and the identical person to whom the bank paid it, he cannot recover his loss from the bank.

Error to Circuit Court, Muskingum County.

Action by J. McHenry against the Old Citizens' National Bank of Zanesville. Judgment for defendant, and plaintiff brings error. Affirmed.

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A suit was commenced December 24, 1907, in the Court of Common Pleas of Muskingum by James McHenry (plaintiff in error) against the Old Citizens' National Bank (defendant in error), based upon the claim of an alleged wrongful payment of a check drawn by the plaintiff on November 2, 1904, on the defendant bank to the order of one George Thresh for the sum of $2,850. Issues having been made by answer and reply, the cause was tried to a jury. At the conclusion of the introduction of the evidtnce, the defendant moved the court to instruct the jury to return a verdict for the defendant, and the plaintiff moved the court to instruct the jury to return a verdict for the plaintiff. Thereupon the court overruled the plaintiff's motion, and sustained that of the defendant. A verdict was thereupon rendered for defendant, and judgment entered thereon. This judgment was affirmed by the Circuit Court, and the plaintiff now asks a reversal of both judgments, and a final judgment in his favor. Facts are stated in the opinion.

John J. Adams and McHenry & Ribble, for plaintiff in error.

We claim the law to be that a bank is bound by a severe rule in paying the check of a depositor. It must follow his order with the utmost strictness. 2 Bolles, Modern Law of Banking, 712; Telegraph Co. v. Bank, 17 Colo. App. 229, 68 Pac. 115; Harmon, Rec'r, v. Bank, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467; Beattie v. Bank, 174 Ill. 571, 51 N. E. 602, 43 L. R. A. 654, 66 Am. St. Rep. 318; Tolman v. Bank, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850.

But we claim that this matter has been decided by our own Supreme Court in the cases of Dodge v. Bank, 20 Ohio St. 234, 5 Am. Rep. 648; Dodge v. Bank, 30 Ohio St. 1; Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655.

C. T. Marshall and F. A. Durban, for defendant in error.

The party who had dealings with McHenry would undoubtedly be guilty of obtaining property by false pretenses in representing to him that he owned land in the vicinity of Otsego; but, having once procured McHenry's check by such means, no forgery would be committed by indorsing the check received in this manner. Forbes & King v. Espy, Heidelbach & Co., 21 Ohio St. 474; Bank v. Bank, 56 Neb. 149, 76 N. W. 430; Land Title & Trust Co. v. Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717; Maloney v. Clark & Co., 6 Kan. 82; Meyer v. Bank, 27 Ind. App. 354, 61 N. E. 596; Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; Smith v. Bank, 6 La. Ann. 610; Metzger v. Bank, 119 Ind. 359, 21 N. E. 973; Bank v. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450; States v. Bank, 17 Pa. Super. Ct. 256; Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467; Edmunds v. Transportation Co., 135 Mass. 283; United States v. Bank, (C. C.) 45 Fed. 163.

Many of these cases go much farther than this, however, and hold that, even when the drawer did not meet his impostor face to face, but the fraud was practiced by mail, the drawer must nevertheless bear the loss. States v. Bank, 17 Pa. Super. Ct. 256; Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467; Metzger v. Bank, 119 Ind. 359, 21 N. E. 973; Maloney v. Clark & Co., 6 Kan. 82; Bank v. Shotwell, 35 Kan. 360, 11 Pac. 141, 57 Am. Rep. 171.

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SPEAR, C. J. (after stating the facts as above). The motion of each party for an instructed verdict necessarily involved a concession that as the case then stood there remained but a question of law to be determined by the court upon a consideration of the controlling facts shown by the record, with the legitimate inferences to be drawn therefrom, and the application thereto of the proper rules of law. As this court does not weigh the evidence, the question here is whether or not, upon any rational view of the case, the judgment is supported by evidence.

But two witnesses were called, the plaintiff himself and one George Thresh, who gave his name as George Thresh, Sr., and his residence as near Otsego, which is in Muskingum county. It is shown that the plaintiff was, November 2, 1904, a practicing lawyer in Muskingum county, having an office in the city of Zanesville. In the forenoon of that day there came to the plaintiff's office two men; one was J. B. Wilson, and the other a strangtr to plaintiff, but introduced by Wilson as George Thresh. These men made it known that the stranger wished to borrow, on note and mortgage, the sum of $3,000. It was represented to plaintiff that the stranger was the owner of a farm of some 300 acres near Otsego, and would place a mortgage on that property to secure the loan. The loan desired was to be for five years at six per cent. interest, payable annually, but the plaintiff explained to the two men that the money, though in his name in bank, was not actually his, but belonged to a client, and the loan would have to be at the rate of seven per centum; in fact, though appearing to be at six per centum on the face of the papers, the discount of the one per cent. to be taken out in advance, and that was assented to. The county map was consulted, and the borrower pointed out the land where it is marked in the name of George Thresh. The two men then left the office, and the plaintiff went to the courthouse to examine the records respecting the title to the land, and then made such examination. He found the title in the name of George Thresh and free of incumbrances. In the afternoon the two men again appeared at the office, the borrower coming first and Wilson a little later, but before the papers were executed. Notes for $3,000 in the aggregate, and a mortgage on the Otsego land to secure them, were then drawn and duly executed by the stranger, represented as an unmarried man, and delivered by him to the plaintiff. Thereupon the plaintiff gave the stranger a check for the amount he was to receive, a copy of which check, as it now appears, follows: "Zanesville, Ohio, November 2, 1904. The Old Citizens' National Bank, United States Depositary. Pay to the order of George Thresh $2,850 (twenty-eight hundred fifty dollars). J. M. McHenry, Attorney." Stamped on face: "Paid November 3, 1904. The Old Citizens' National Bank, Zanesville, Ohio." Indorsed on back: "George Thresh, J. B. Wilson." The check given the borrower was in fact paid by the bank November 3, 1904. During the entire transaction of November 2, 1904, including the act of delivering the check to the stranger, plaintiff believed he was the George Thresh living at Otsego and the owner of the farm, relying entirely on the introduction by Wilson, and taking no other means of ascertaining the stranger's identity. Plaintiff had known Wilson for some time, and had had business transactions with him. As matter of fact the stranger was not George Thresh of Otsego: that George Thresh, as has already been indicated, was known as George Thresh, Sr., and so wrote his name. He was not at the office of plaintiff, or at the bank, nor did he have any agency in the

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transaction at the time, or knowledge of it until several years later. In short, the stranger perpetrated a swindle, and got the money by falsely representing himself to be another person, and to be the owner of the farm.

The plaintiff testified that, when he gave the man the check, he believed him to be George Thresh, the owner of the real estate; that he expected him to go to the bank and be identified as George Thresh, and get the money, adding that he "expected the bank to do what he considered their duty, to pay the man named in the check, George Thresh, $2,850. Whether that was the man or not, I didn't pay any attention to it." And, again, to a question whether there was any doubt in his mind that the man would go right to the bank with the check, answered: "I didn't think anything about that." And, to a further question as to his intention, answered: "I intended to give him the check, and he could do with the check as he pleased." It is sought to charge the bank with having paid the check as on a forged indorsement, and, in this connection, it is averred "that said unknown person to whom said check was delivered was not the said George Thresh whom the plaintiff then and there believed him to be." But there is no evidence in support of the charge in the petition that the name George Thresh on the back of the check was forged, and, for all that appears, that man's name may have been George Thresh. Reduced to its last analysis, the situation is that the bank paid the money which the check called for to the identical person who the plaintiff expected would receive the money on it, though not to the George Thresh to whom the plaintiff supposed he was giving the check. The plaintiff's ground of right to recover is based, not upon a charge that the bank failed to pay to one named George Thresh, but because it did not pay to a particular George Thresh who was the owner of the land. True, the plaintiff testified that he expected the man to go to the bank and be identified as George Thresh and get the money. But this can hardly mean that he expected the holder of the check to be identified at the bank as the owner of the farm on which the mortgage had been attempted to be placed in face of the fact that the bank was a total stranger to the transaction of the loan and mortgage, and knew nothing whatever about the land. Surely such a supposition would be so manifestly absurd as not to justify serious consideration.

The fact of the payment of the check to the wrong man did not come to the knowledge of the plaintiff for three years after the date of the check. He then tendered to the bank the check and demanded payment of the amount, which was refused. No direct evidence was given respecting the transaction of payment, but the petition avers that the check was presented to the bank by the unknown person and the money paid by the bank to him, and the legitimate inference to be drawn from the indorsements on the check is that Wilson identified the man holding the check as George Thresh, since the legal effect of a second indorser's contract is to guarantee the genuineness of the earlier indorsement. The bank, therefore, is presumed, under the well-known methods of business, to have relied upon such identification, and in so doing was at least fully as vigilant as was the drawer of the check who relied upon precisely the same source of identification.

It is averred, and not denied, that the bank did not ask the plaintiff if the bearer was the rightful payee of the check, but this fact loses importance in the light of the testimony, for, had such inquiry been

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made, the answer, consonant with the declarations of the plaintiff on the witness stand, would have undoubtedly been in the affirmative. It is inconceivable that the plaintiff would then have questioned the right of the bearer of the check to receive payment of it. The kernel of the whole trouble lay in the false representation of the stranger that he was the owner of the farm, and the ready acceptance by the plaintiff of the truth of that representation. All other incidents connected with the loan center about those two facts, and with neither of those facts did the bank have the slightest connection. The inference seems irresistible that, if the bank was guilty of any negligence whatever in paying the check, the plaintiff was guilty of greater negligence in issuing it, and thus giving a stranger opportunity to perpetrate a fraud on an innocent drawee.

The discussion by the learned counsel has taken a wide range. We do not, however, consider that it is necessary for us to take space with extended discussion or citation of authorities respecting the question of the general duty and liabilities of banks in dealing with the checks of their depositors. The question simply is whether, under the circumstances shown by the record in this case, the drawer of the check ought to prevail as against the bank. Ought the bank to be held liable as for a negligent payment on a forged indorsement? We think not, and the refusal may be placed upon two grounds. One that, there being no proof that the name of the person who received payment of the check was not George Thresh, there is no evidence of a forgery in any legal sense; and another that under the well-established rule (Selser v. Brock, 3 Ohio St. 302; Ogden v. Ogden, 4 Ohio St. 182; Bigelow v. Comegys, 5 Ohio St. 256; Resor v. O. & M. Rd. Co., 17 Ohio St. 139; Ramsey v. Jones, 41 Ohio St. 685) that, where one of two innocent persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence and commits the first oversight must bear the loss, the plaintiff is estopped by his own lack of caution to now demand payment of the amount of the check by the bank. The principle is of wide application, and is illustrated in many cases relating to the illegal possession of personal property by a wrongdoer fraudulently personating the real owner, and thus clothing himself with indicia of ownership. A number of these cases are referred to by counsel for defendant in error, and will be found cited in the reporter's notes.

It is important to note that the case at bar is to be distinguished from many in the books where the bank was sued by the payee of a check wrongfully paid to one personating the payee and forging his signature. Of such cases is that of Dodge v. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, and Id., 30 Ohio St. 1. It is to be noted, also, that a clause of the opinion in the last cited report indicates that had the defendant shown that the person to whom the check was delivered by the drawer was in fact the person whom the drawer intended to designate as Frederick B. Dodge, a different question would have been presented, and it is a fair inference, considering the entire report of the case, that, if the suit had been brought by the drawer instead of the payee, the opinion of the court upon the question of liability might have been different. Nor do we think that the case of Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655, much relied upon by plaintiff's counsel, sustains their contention. The facts were essentially different; there being no negligence shown on the part of the drawer of the check.

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We find no error in the judgment of the Circuit Court affirming that of the Common Pleas, and the same will be affirmed.

DAVIS, SHAUCK, PRICE, and JOHNSON, JJ., concur. DONAHUE, J., not participating.

Decision No. 1470.

GREENSBURG NAT. BANK v. C. SYER & CO. et al.

(Supreme Court of Appeals of Virginia. January 18, 1912.)

73 S. E. 438.

BANKS AND BANKING — DRAFTS — DEPOSITS.

If a bank received a draft as a deposit to be treated as cash by the depositor, according to the intention of the bank and the depositor when it was deposited, the title thereto passed to the bank; but, if the intention was that the bank should only receive the draft for collection, title did not pass to it.

Evidence held to show that a draft with bill of lading attached was deposited by the drawer in his bank for collection, and not so as to pass title thereto to the bank.

Error to Law and Chancery Court of City of Norfolk.

Action, aided by attachment, by C. Syer & Co. against J. M. Hornung, in which the Greensburg National Bank intervenes as claimant of the attached funds. Judgment for plaintiff against the original defendant directed to be paid out of the fund, and the bank brings error. Affirmed.

Loyall, Taylor & White, for plaintiff in error.

Jeffries, Wolcott, Wolcott & Lankford, for defendant in error.

KEITH, P. Syer & Co., of Norfolk, purchased of J. M. Hornung, of Greensburg, Ind., a car load of flour. When the flour was shipped, Hornung attached the bill of lading to a draft on Syer & Co. for $1,062, and deposited the draft in the Greensburg National Bank of Greensburg, Ind. Upon arrival of the flour at Norfolk, Syer & Co. claimed that it was of inferior quality and refused to pay the draft which had been presented to them by the Citizens' Bank of Norfolk, through which the draft had come from the Greensburg National Bank. Syer & Co. notified Hornung of their dissatisfaction with the flour, and thereupon Hornung wired Syer & Co. to draw on him for the amount of the depreciation in the value of the flour. Syer & Co. did not take up the draft, but drew on Hornung for the depreciation, which draft Hornung refused to pay, and upon his refusal Syer & Co. went to the Citizens' Bank of Norfolk, took up the draft for $1,062, and immediately brought suit against Hornung for the amount of the depreciation in the flour and attached the money in the hands of the Citizens' Bank of Norfolk as the property of Hornung.

The Greensburg National Bank was allowed to intervene as claimant of the fund held by the Citizens' Bank, and thereupon moved to quash the attachment on the ground that the fund was not the property of Hornung, but belonged to the Greensburg National Bank, and

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that the attachment was issued upon false suggestion. The matter was submitted to a jury, who found that the money in the bank was the property of Hornung and subject to the attachment of Syer & Co.; a judgment was entered in favor of Syer & Co. against Hornung for $420, the amount of the depreciation in the flour, which was directed to be paid by the Citizens' Bank out of the fund which had been attached in its hands; and thereupon the Greensburg National Bank obtained a writ of error from this court.

Defendants in error urge several formal objections to the course of procedure in the trial court, which, in the view we take of the case, need not be here considered.

The draft deposited by Hornung in the Greensburg National Bank was listed on the following deposit slip:

Deposited in
Greensburg National Bank
of
Greensburg, Ind.
By J. M. Hornung, August 14, 1909.
Please list each check separately.

	Dollars.	Cents.
Currency		
Gold		
Silver		
Draft, C. Syer & Co	1062	00

Certain entries in Hornung's passbook were introduced in evidence, consisting of several items of cash during the month of August, 1909, then an entry on the 14th, "Syer & Co. $1,062.00," followed several entries of cash during the same month.

The plaintiff proved by a witness, the vice-president of the Seaboard Bank of Norfolk, that he had been engaged in the banking business for a number of years and was acquainted with the customs and usages among bankers throughout the country as to the manner of handling drafts for their customers; that it was the general usage and custom to permit a customer to deposit a draft with the bank for collection, and pass the amount thereof to the credit of the customer, and to permit the customer to check upon the amount so credited, the recognized understanding being that, when the draft is received by the bank for collection, it may be charged back to the customer's account at any time if not paid; that this is recognized merely as a favor from the bank to the customer, at the option of the bank, dependent largely upon the confidence the bank has in the customer, and the extent of his dealings with the bank. On cross-examination this witness testified, further, that it was the custom of banks to purchase drafts as well as to take them for collection; that, from an inspection of the draft in this case, the deposit slip and bank book, it was evident that the draft was discounted by the bank and that J. M. Hornung received cash for the same; that the draft shows on its face that it was deposited in the Greensburg National Bank as cash, and not for collection; that the indorsements on the back of the draft show it was handled by the banks whose stamps appear thereon for collection; and that the bank book shows that the bank had not been reimbursed by J. M. Hornung, or by the collection of the draft.

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It further appears in the evidence on behalf of the Greensburg National Bank that it received from Hornung a draft with bill of lading on Syer & Co. for $1,062 for credit to Hornung; that the draft was presented with the passbook of John M. Hornung, and the sum of $1,062 was credited on Hornung's passbook, and the account of Hornung on the general ledger was credited with a like amount; that, in saying that Hornung was credited with that amount, the witness meant that for that amount the Greensburg National Bank became the debtor of Hornung and that he became the creditor; that the draft was forwarded by the Greensburg National Bank with instructions to collect and place the proceeds to its credit; that the amount of the draft was charged on its general ledger to an account as "due from other banks;" that it was the custom of banks, when drafts were received from strangers, or when presented by customers for collection only, to forward the drafts to the proper point for collection, and the proceeds when received were credited to the property party, and in that case the draft would not become the property of the bank, but it would be acting as agent for the payee of the draft; that in such case in its indorsement on the draft there would appear the words "for collection;" that the credit which was given Hornung for the draft in dispute had never been canceled or charged off on his account; that at the time the draft in question was received by the Greensburg Bank Hornung's account was overdrawn $91.68; that after the deposit of that draft there was a balance to his credit of $970.32; that Hornung had no authority or right from the Greensburg National Bank to instruct the Citizens' National Bank at Norfolk, or C. Syer & Co., or any one, to reduce the amount of the draft in question in the payment thereof; that, when the draft was received by the Greensburg National Bank, it was the intention of the bank to purchase the draft for the sum stated therein and credit the account of John M. Hornung the same as if it had been that amount of actual money. The testimony of another witness introduced by the bank is substantially to the same effect.

After the testimony was closed, the court gave to the jury the following instruction: "The court instructs the jury that the question as to whether or not the title to the draft deposited by Hornung with the Greensburg National Bank passed to the bank or remained in Hornung is one of the facts to be determined by the jury, under all the facts and circumstances of this case as proven by the evidence. If the jury believes from the evidence that the Greensburg National Bank received the draft as a deposit to be treated as cash, and that such was the intention of said bank and Hornung at the time said draft was deposited, then title to the draft passed to the bank and the jury should find in its favor; but if the jury believes from the evidence that it was the intention of the bank and Hornung, at the time of the deposit of the draft, that said draft should not be received as cash, but only by the bank as an agent for collection, then the title to the draft did not pass to the bank, and the jury should find for the plaintiff. Checks or drafts deposited or credited, if intended to be for collection only, do not become the property of the bank, even if the depositor has been allowed to check against the deposit before the paper is collected."

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This instruction was not objected to by either party to the controversy. It is, we believe, a correct statement of the law, and, in any event, there being no exception to it, it is the law of this case.

Defendants in error rely upon the following propositions, which are shown in evidence, as being sufficient to maintain the verdict and judgment complained of: That the transaction was in line with the regular custom among banks in crediting such collections for the accommodation of their regular depositors; that Hornung was an old depositor of the bank of six or seven years standing; that the draft was not discounted, but the whole amount thereof was placed to Hornung's credit; that it was deposited as paper, and not as cash; that it was treated and dealt with by Hornung and his attorneys, in his correspondence with Syer, as his property and under his control; that the attorneys who appeared for Hornung in dealing with Syer & Co. also appeared for the bank in the taking of depositions; that, instead of requiring protest and notice of dishonor to be given or waived so as to hold the maker and indorsers liable in case of dishonor, the bank directed that no protest should be made, showing that it did not look to the maker for recourse as such under the laws governing the transfer of negotiable instruments; but that the draft was regarded as being still Hornung's paper, which, under the custom and usage shown to exist, could be charged back to him at any time.

The jury, as we have seen, found a verdict for the plaintiff; the court entered judgment upon that verdict; there was no exception to the law, as stated to the jury by the court; and the case is before us upon a demurrer to the evidence. Our only province, therefore, is to consider whether or not there be sufficient testimony to sustain the verdict of the jury.

In Lynchburg Milling Co. v. National Exchange Bank, 109 Va. 639, 64 S. E. 980, the plaintiff in error, who was the plaintiff in the court below, brought an action of assumpsit against White & Rumsey Grain Company of Chicago, and issued an attachment upon the effects of the defendant in the possession of the National Exchange Bank. The bank answered, denying the suggestion, but stated by way of explanation that it had received from and on account of the Continental National Bank of Chicago a draft drawn by the defendant, the White & Rumsey Grain Company, on the plaintiff, the Lynchburg Milling Company, in favor of the Chicago bank for $533.35 for collection, to which draft a bill of lading was attached for a car load of oats shipped by the defendant to the plaintiff; that the draft was paid by the plaintiff to respondent, and the amount placed to the credit of the Chicago bank, but the fund was not remitted because of the pendency of the attachment. And the question considered was to whom the money attached belonged — whether to the White & Rumsey Grain Company, or to the Chicago bank. It was held in that case to be the property of the latter, and that the attachment had been sued out upon false suggestion. A circumstance relied upon by plaintiff in error in that case was that the drawer waived protest and notice; but this court was of opinion that the circumstance was not inconsistent with the Chicago's bank's bona fide ownership of the draft. The court did not hold that it was not a pertinent fact to be considered along with other circumstances in determining the question of ownership.

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In the case of St. Louis, etc., R. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, the court said, speaking of deposit of a draft in bank, that: "If there be no bargain that the property should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain." And in the same case it was said that the fact that the draft was entered at its full value indicated that it was not discounted but credited for convenience and in anicipation of its payment.

In Bailie v. Augusta Savings Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74, Chief Justice Simmons, speaking for the Supreme Court of Georgia, said: "In the absence of anything indicating a different understanding, a bank which in the ordinary course of business receives from a depositor a check upon another bank, and credits it on his deposit book, not as cash, but as a check, will not be held to be an absolute purchaser of the check. If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper."

It is insisted by counsel for plaintiff in error that no importance should be attached to the correspondence between Hornung and his attorneys and Syer & Co. with respect to this draft after Syer & Co. had refused payment, upon the ground that before this correspondence took place Hornung had parted with all interest in the draft, the title to which had passed to the Greensburg National Bank, and that Hornung no longer had any interest in or control over it.

The trouble with this objection is that it assumes the truth of the very fact which is the subject of inquiry — the ownership of the draft in question. The introduction of the evidence was not objected to. It would have been proper, if the court had been requested so to do, for it to have stated to the jury that Hornung's admissions or conduct with respect to this draft could not prejudice the Greensburg National Bank after Hornung had parted with his entire interest in it; but no such request was made, and no such limitation imposed, and the jury, under the circumstances, might very well have thought that Hornung would not have authorized Syer & Co. to reduce the draft by the amount of the depreciation unless he had some control over the subject.

Looking to the whole case as it was presented to the jury, the custom among bankers, the relation of Hornung to the Greensburg National Bank as a depositor of many years standing, that the draft was not discounted, that the whole amount thereof was placed to Hornung's credit, that it was deposited as paper and not as cash, that it was treated and dealt with by Hornung and his attorneys as his property in their correspondence with Syer & Co., and that protest was waived, it presents a case in which this court cannot say that the verdict of the jury, rendered upon proper instructions and approved by the trial court, was without evidence to sustain it, and therefore the judgment complained of is affirmed.

Affirmed.

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Decision No. 1471.

ALLEN v. PURITAN TRUST CO.

(Supreme Judicial Court of Massachusetts. Suffolk. March 5, 1912.)

97 N. E. 916.

BANKS AND BANKING — DEPOSITS — EXECUTORS AND ADMINISTRATORS — SUBROGATION — ESTOPPEL — TRUST FUNDS — NOTICE.

Money deposited in a bank is held by the bank subject to the obligation to pay to the depositor on demand or to his order.

Where money is deposited in a bank, the checks of the depositor will not transfer the debt or title to the payee without the bank's consent.

When an administrator filed only a first account, on which no action was taken by the probate court until after his death, its decree upon the second account, presented by the second administrator, who was also the administrator of the first administrator, is, in view of Rev. Laws, c. 162, § 2, defining the general jurisdiction of probate courts and the effect to be given their adjudications, decisive against the surety on the first administrator's bond as to the amount of his defalcation, and cannot be collaterally attacked in a suit by the second administrator against the bank in which the estate funds were deposited to recover moneys which the bank's negligence permitted the first administrator to embezzle.

The failure of the next of kin to ascertain that the estate was being misappropriated by an administrator, where such failure did not mislead the surety on his bond, would not defeat a suit on such bond by the second administrator.

The second administrator of an estate, after a defalcation by the first administrator, by relying on his surety bond, did not thereby waive his right to proceed subsequently against the bank charged with participation by negligence in the misappropriation, even if, by agreement between them, the expenses of the suit were to be borne by the surety, and, if successful, the amount recovered was to be divided in certain proportions for its benefit and the benefit of the estate.

After the difference between the penalty of an administrator's bond and the amount of the probate decree, fixing his defalcation, with the costs of recovery, were satisfied from any proceeds recovered by the second administrator from a bank in which the first administrator had made deposits, the surety would be subrogated to the excess, and could enforce such right by suit.

Negligence by the next of kin in failing to make a defaulting administrator account, or to inquire into his administration of the estate, will not preclude his successor from recovering from the bank, where the estate funds were deposited, the amount of checks drawn on the estate account by the administrator and deposited to his individual account in the same bank, whereby the defalcation was made; the next of kin having no knowledge of the transactions and no information to arouse their suspicions, the bank standing in no contract relation to the next of kin, and not having been misled by their failure to act.

Where an administrator gave an agreement of indemnity to procure a contract of suretyship, the failure of the surety to enforce such agreement, the agreement being only for the protection of the surety, does not estop the second administrator from proceeding against a bank which participated by negligence in the first administrator's embezzlement of the funds of the estate.

Where the source and nature of an account in the name of an estate, followed by the name of the administrator, were fully disclosed by the terms of the deposit in a bank, the officers and agents of the bank were charged with knowledge of the scope

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and effect of entries relating to the deposit, as shown on the bank's books, and the bank must be held to have known that, if the administrator appropriated the deposit to his own use, the appropriation would be a breach of its trust; the money on deposit being the property of the estate, though the bank's debt was technically to the administrator.

Where a bank receives deposits to the account of an individual, and also deposits to the account of an estate, naming such individual as administrator, and pays checks drawn on the account of the estate to the individual account to reimburse itself for overdrafts on the individual account, the nature of the estate fund was not changed by having been placed to the personal credit of the administrator, and its transfer was a voluntary participation by the bank in the payment of the overdraft out of the funds of the estate.

A bank, receiving a deposit in the name of an estate, followed by the name of the administrator, and so having notice that it was dealing with trust funds, was bound, when permitting checks on the estate account to be paid to the account of the administrator individually, by any information which it could have obtained if an inquiry had been pushed until the truth had been ascertained.

A bank, which knows that a fund on deposit with it is a trust fund, cannot appropriate it for its private benefit, or, where charged with notice of the conversion, join in assisting others to appropriate it for their benefit, without being liable to refund the money, if the appropriation is a breach of trust.

Case Reserved from Supreme Judicial Court, Suffolk County.

Bill by Charles E. Allen, administrator, against the Puritan Trust Company. To a master's report, both parties except. Report confirmed, and decree for plaintiff as to a part of the issues.

Peabody, Arnold, Batchelder & Luther, for plaintiff.

A. E. Pillsbury and Warren, Garfield, Whiteside & Lamson, for defendant.

BRALEY, J. The master to whom the case was referred reports that William L. Baker, the first administrator of the estate of Albert H. Bird, opened two accounts with the defendant. By the terms of deposit as entered on its books, the first stood in his name individually, while the second consisting wholly of moneys belonging to the estate appeared in the name of the estate followed by his own name as administrator. But while the money deposited could be disposed of by the company subject only to the obligation to pay an equivalent sum on demand, or to his order, the checks of the depositor would not transfer the debt, or title to the debt to the payee without the defendant's consent. Carr v. National Security Bank, 107 Mass. 45, 48, 9 Am. Rep. 6; Gregory v. Merchants' National Bank, 171 Mass. 67, 69, 50 N. E. 520; Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 881, 483, 69 N. E. 215; Bank of the Republic v. Millard, 10 Wall. 152, 157, 19 L. Ed. 897; Phœnix Bank v. Risley, 111 U. S. 125, 4 Sup. Ct. 322, 28 L. Ed. 374. The master finds that either to reimburse the defendant for overdrafts, or for his own private purposes, Baker as administrator transferred the money of the estate to his personal account by checks drawn to his own order, and that it also accepted checks in similar form drawn on the funds of the estate deposited in a national bank, and credited him with the amounts. The report further states that there was no evidence to show that the

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administrator had authority in fact to make any of these transfers for his own use, and there having been none in law, the plaintiff, who is the second administrator of the Bird estate, having been partially reimbursed by the payment of the surety company on the first administrator's bond, brings this bill in equity to recover from the defendants the full amount of the embezzled deposits.

The second and third of the defendant's nine exceptions to the report having been expressly waived, we first consider the first, fifth, and sixth which raises the questions whether the finding of the master that the decree of the probate court upon the second administrator's account was conclusive as to the amount of Baker's embezzlement, and his rulings that the plaintiff's right of recovery was not affected by the conduct of the surety company, or defeated by the failure of the next of kin of Bird to discover his misconduct and protect the estate, and the exclusion of evidence offered in support of these alleged defenses, were erroneous. The surety company was obliged to pay the amount fixed by the probate decree until the penal sum was exhausted, and Baker having filed only a first account on which no action was taken by the court until after his death, the decree upon the second probate account presented by the plaintiff, who also is his administrator, is decisive as to the amount of the defalcation, and cannot be collaterally attacked in the present litigation. Rev. Laws, c. 162, § 2; Bennett v. Pierce, 188 Mass. 186, 187, 74 N. E. 360; Connors v. Cunard Steamship Co., 204 Mass. 310, 322, 90 N. E. 601, 26 L. R. A. (N. S.) 171, 134 Am. St. Rep. 662, 17 Ann. Cas. 1051. If it had not paid, the plaintiff could have sued, and the failure of the next of kin to ascertain that the estate was being minsappropriated would not have defeated the suit. Oberlin College v. Fowler, 10 Allen 545; Hayes v. Hall, 188 Mass. 510, 514, 74 N. E. 935; Choate v. Arrington, 116 Mass. 552, 556.

The plaintiff if he preferred could resort to the bond, rather than litigate the alleged equitable claims now presented against the defendant, which if fully recovered would have been insufficient to exonerate the surety. By relying on the bond he did not waive his right to proceed subsequently against the defendant, even if by agreement between them the expenses of the present litigation are to be borne by the surety, and if successful, the amount recovered is to be divided in certain proportions for its benefit, and the benefit of the estate. O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411. Moreover, the surety would have been subrogated to the excess, after the difference between the penalty of the bond, and the amount of the probate decree with the costs of recovery had been satisfied from any proceeds recovered from the defendant, and could have enforced this right by suit. Johnson v. Bartlett, 17 Pick. 477; Hart v. Western Railroad, 13 Metc. 99, 46 Am. Dec. 719; Wall v. Mason, 102 Mass. 313, 316; Thayer v. Finnegan, 134 Mass. 62, 66, 45 Am. Rep. 285. It may be assumed that if the next of kin had been diligent the misconduct of the administrator might have been discovered earlier; but they are not shown to have known of the transactions or been possessed of any information which should have aroused their suspicion, and their inaction by failing to compel the administrator to account, or to inquire as to his administration of the estate did not mislead the defendant, with whom they sustained no

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contractual relations. Stiff v. Ashton, 155 Mass. 130, 29 N. E. 203. The agreement of indemnity which Baker gave to procure the contract of suretyship having been for the protection only of the surety, its failure to enforce it does not estop the plaintiff from pursuing the defendant if a participator in the administrator's betrayal of the trust.

But if these exceptions are not tenable, the fourth, seventh, eighth, and ninth exceptions present the principal questions upon which the defendant's liability depends. It broadly contends that the master's findings that on and after the date of the first overdraft, which was paid by a check drawn on the estate's account, the defendant if judged from the point of view of a reasonably prudent banker had knowledge of such facts as should have led it to suspect that the funds of the estate were being wrongly used, were unwarranted either in law, or upon the evidence, and that it cannot be held for any part of the moneys taken by the administrator. The personal property of the estate was held by him in a fiduciary capacity, and the source and nature of the respective accounts were fully disclosed by the contract. Robins v. Hope, 57 Cal. 493, 497; Hayes v. Hall, 188 Mass. 510, 511, 74 N. E. 935; J. G. Brill Co. v. Norton & Taunton Street Railway, 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; Quinn v. Burton, 195 Mass. 277, 279, 81 N. E. 257. And in the discharge of their several duties, which were fully detailed by the master, the officers and agents of the defendant were charged with knowledge of the scope and effect of the various entries relating to the deposit as shown on the defendant's books. Foster v. Essex Bank, 17 Mass. 479, 489, 9 Am. Dec. 168; Elliott v. Worcester Trust Co., 189 Mass. 542, 545, 75 N. E. 944; East Hartford v. American National Bank, 49 Conn. 539; Bundy v. Monticello, 84 Ind. 119; American Exchange National Bank v. Loretta Gold & Silver Mining Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; Cutler v. American Exchange National Bank, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328; Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142; Bodenham v. Hoskyns, 2 De G. M. & G. 903; Pennell v. Deffell, 4 De G. M. & G. 372; Bailey v. Finch, L. R. 7 Q. B. 34. If the primary relation was that of debtor and creditor, nevertheless on the face of a specific contract the money belonged to the estate, and the defendant must be held to have known that if the administrator appropriated it to his own use the appropriation would be a breach of his trust. Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; McCarthy v. Provident Institution for Savings, 159 Mass. 527, 34 N. E. 1073; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Central National Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. The money due to the defendant for overdrafts was paid with its knowledge and consent by checks drawn on the administrator's account, which were in excess of the debt, and were correspondingly credited in his private account. If, as the defendant urges, the legal title to the personal property of the estate was in the administrator, the beneficial interest was in the heirs of the intestate, who not only could demand, but could enforce an accounting. Rev. Laws, c. 150; Bard v. Wood, 3 Metc. 74; Choate v. Jacobs, 136 Mass. 297; Silsby v. Young, 3 Cranch 249, 2 L. Ed. 429. And the nature of the fund was not changed by its having been diverted, and placed to the personal credit of the administrator. Mor-

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rill v. Raymond, 28 Kan. 415, 42 Am. Rep. 167; Central National Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Union Stockyards National Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; Bailey v. Finch, L. R. 7 Q. B. 34.

It is not a sufficient answer, that if inquiry had been made, doubtless the administrator might have given an explanation which would have appeared to be reasonable. Having notice of the trust, the defendant was dealing with trust funds, and was bound by the information which it could have obtained if an inquiry had been pushed until the truth had been ascertained. Shaw v. Spencer, 100 Mass. 382, 389, 391, 97 Am. Dec. 107, 1 Am. Rep. 115; Loring v. Brodie, 134 Mass. 453, 459; Ex p. Kingston, L. R. 6 Ch. App. 632. The transformation of the account in the manner adopted was furthermore a voluntary participation on the part of the defendant with an agreement to credit and pay the amount of the excess to Baker individually. The defendant places much reliance upon the case of Gray v. Johnston, 3 H. L. Cas. 1, where a single check on the funds of the estate having been drawn by the executrix not to her individual order, but to the order of the firm to whose membership she succeeded on the death of her husband, the defendant was held not to be responsible for the misappropriation, as it might well have been assumed by the bank, that the check was properly given in settlement of the accounts between the partnership and her husband's estate. The decision in Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45, rests upon the ground that the defendant received the checks of the treasurer drawn on funds of the corporation in payment of his individual debts in good faith, and without any actual knowledge or information which should have put her upon inquiry as to the source from which he obtained the sums sent her. So also in Batchelder v. Central National Bank, 188 Mass. 25, 73 N. E. 1024, the single justice found, that the bank had no reason to believe that the trustee who deposited the check in his individual account, which was payable to his own order as trustee, was acting dishonestly, while in Newburyport v. Spear, 204 Mass. 146, 90 N. E. 522, 134 Am. St. Rep. 652, the city treasurer having paid his own debt by a check drawn against the city's funds, it was said that "in the absence of suspicious circumstances the bank had no duty to concern itself with that subject."

In the present case, however, during a period from January 25, 1902, to December 23, 1902, there were numerous checks differing in amount, but each of the same general tenor and fraudulent nature, and two distinct accounts plainly indicating the different capacities in which Baker transacted business with the defendant. The payments to itself, with the accompanying transfers from the estate's account to his private account could not have been accomplished without the active instrumentality of the defendant. If the doctrine of constructive notice has no application where there is no duty of inquiry resting upon the banker, the fifth and sixth general findings establish the fact, that the unlawful transfers were made under such conditions, that the defendant was charged with knowledge of the irregularities. Kennedy v. Green, 3 Myl. & K. 699; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807. The findings having been amply warranted by the master's statement of the evidence are decisive as to the defendant's knowledge, as well as of its participation, for which it must be held

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accountable. School District in Greenfield v. First National Bank, 102 Mass. 174, 176; Merchants' National Bank v. Haverhill Iron Works, 159 Mass. 158, 34 N. E. 93; National Revere Bank v. Morse, 163 Mass. 383, 385, 40 N. E. 180; Regester's Sons Co. v. Reed, 185 Mass. 226, 227, 70 N. E. 53.

The principle governing the defendant's liability is that a banker who knows that a fund on deposit with him is a trust fund cannot appropriate that fund for his private benefit, or where charged with notice of the conversion join in assisting others to appropriate it for their private benefit, without being liable to refund the money if the appropriation is a breach of the trust. Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Fisher v. Brown, 104 Mass. 259, 261, 6 Am. Rep. 235; American Exchange Bank v. Loretta Gold & Silver Mining Co., 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; American National Bank v. Fidelity & Deposit Co., 129 Ga. 126, 58 S. E. 867, 12 Ann. Cas. 666; Swift v. Williams, 68 Md. 236, 11 Atl. 835; Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; Bank of Greensboro v. Clapp, 76 N. C. 482; Ihl v. Bank of St. Joseph, 26 Mo. App. 129, 141; Commercial Bank v. Jones, 18 Tex. 811; East Hartford v. American National Bank, 49 Conn. 539; Bundy v. Monticello, 84 Ind. 119; Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585; Farmers' Loan & Trust Co. v. Fidelity Trust Co., 86 Fed. 541, 30 C. C. A. 247; Central National Bank of Baltimore v. Connecticut Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693. Compare Goodwin v. American National Bank, 48 Conn. 550.

The master's seventh general finding, that the defendant did not have any actual knowledge or suspicion that the administrator by the subsequent transfers was misappropriating the funds of the estate, and that it was not privy to them, is not inconsistent with the fifth and sixth findings, and disposes of the plaintiff's further contention, that the defendant should be charged with the amount of these embezzlements. We are not unmindful of the strength of the plaintiff's argument, that even if the defendant was under no obligation to supervise the application of the money, yet it could not have been compelled to honor and credit his individual account with checks drawn on trust funds to his individual order by which the numerous fraudulent transfers from one account to the other covering a period of two years were affected, and that by the respective contracts of deposit the individual and representative accounts were plainly distinguishable. Thatcher v. State Bank, 5 Sandf. (N. Y.) 121; Chicago Marine Fire Ins. Co. v. Stanford, 28 Ill. 168, 173, 81 Am. Dec. 270; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Hunt v. Manire, 34 Beav. 157, 160. But while upon their face these circumstances well might have led the defendant to suspect that a misappropriation was taking place, and that money of the estate was being applied to the administrator's private use, whether the defendant had notice of the irregularities was one of fact, and the master's finding not appearing to be clearly wrong should not be reversed. School District in Greenfield v. First National Bank, 102 Mass. 174, 176; Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45.

The five checks drawn by Baker to his own order on funds of the estate deposited in a national bank, which the defendant discounted, and placed to his individual credit are also covered by the master's

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finding. It presented the checks in good faith to the bank on which they were drawn, and had the right to rely on the representation of the bank by the payment of the money, that the checks were not being used for Baker's personal advantage. Rev. Laws, c. 73, §§ 69, 72, 73. Havana Central R. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12.

The exceptions of each party to the master's report, therefore, must be overruled, and the report confirmed, and the defendant is to be charged only for the amounts received in payment of the overdrafts and the amounts transferred to Baker's individual account in the settlement of the overdrafts with interest from the dates stated in the report.

Decree accordingly.

Decision No. 1472.

FALLS CITY WOOLEN MILLS v. LOUISVILLE NAT. BANKING CO.

(Court of Appeals of Kentucky. October 24, 1911.)

140 S. W. 66.

BANKS AND BANKING.

Plaintiff deposited to his account a check drawn upon a bank in another State, indorsing it to the order of the bank, and it was entered on a deposit slip on which was the printed statement, "All items credited subject to final payment," and sent by the bank to its correspondent bank for collection. It was collected by that bank, but the proceeds were not paid over and the correspondent bank became insolvent, on which the depositor's bank charged it back against plaintiff's account. There was no evidence as to any want of diligence or due care in the selection of the correspondent bank. Held, in an action by the depositor to recover the amount of the check, that the bank was entitled to a directed verdict.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by the Falls City Woolen Mills against the Louisville National Banking Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bodley & Baskin, for appellant.

Tyler & Barnett and J. C. Dodd, for appellee.

HOBSON, C. J. The Falls City Woolen Mills, a corporation having its headquarters in Louisville, had a deposit account with the Louisville National Banking Company, and made deposits from day to day; the secretary and treasurer of the company, who made the deposits, being also a director in the bank. On November 15, 1907, the woolen mills made a deposit, consisting of several items, amounting to $1,134.15. One of the items embraced in the deposit was a check drawn by the Alcorn Woolen Manufacturing Company, of Corinth, Miss., for $750, on the Union Bank of Corinth, payable to the order of the woolen mills.

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The check was indorsed as follows: "Pay to the order of the Louisville National Banking Company. Falls City Woolen Mills, by J. E. Whitnty, Secretary and Treasurer." The deposit slip on which the items were entered had the following printed head: "All city checks deposited after 11:30 A. M. and on Saturday after 10:30 A. M. will be received at depositor's risk until the next day's settlement. All items credited subject to final payment." Nothing was said between the parties about the check at the time the deposit was made. The bank sent the check to the Tishomingo Savings Institution at Corinth for collection. It collected the check, but did not pay over the money, and failed. The bank thereupon charged the amount back to the account of the woolen mills, and this action was brought by it against the bank to recover the amount of the check; it being alleged in the petition that the bank bought the check and had not accounted to it for the price. The bank by its answer denied that it bought the check, and alleged that it took it for collection. The case was submitted to the jury on these issues. The jury found for the bank, and the woolen mills appeals.

In Farmer's Bank v. Newland, 97 Ky. 464, 31 S. W. 38, 17 Ky. Law Rep. 329, it was held that, where a customer deposits with a bank a check or bill for collection at a point distant from the location of the bank, he does so with the implied understanding that the bank will follow the customary method in making such collection, and can only be held responsible for due care and diligence in the selection of the correspondent who is to make the collection. There is neither pleading nor proof to show that there was any negligence on the part of the bank in selecting the Tishomingo Savings Institution. On the contrary, the undisputed evidence is to the effect that it stood high and was to all appearances a proper correspondent for the purpose. The plaintiff rests its right to recovery upon the sole ground that the bank did not take the check for collection but bought it.

As to the facts there is no dispute in the evidence. The check was simply taken with the other items on deposit by the receiving teller, without anything being said by the depositor or by him. The deposit check provided that all items were credited subject to final payment. There was nothing in the transaction to indicate a purchase by the bank of the check. No inquiry was made as to the solvency of the drawer, or of the bank on which the check was drawn. So far as appears, the bank knew nothing of either. The receiving teller was without authority to buy paper. This power was conferred only on other officers of the bank. The woolen mills was a customer of the bank, and had been for a long time. The person who made the deposit was one of the directors of the bank, and well knew its rules and regulations. It was the custom of the bank to credit at their face checks drawn on banks out of the State, and to collect from the customer a small charge to cover cost of collection. This check was credited at its face, and the usual charge for collection was paid in cash by the customer. The words on the deposit slip, "All items credited subject to final payment," mean that the credit is given subject to the final payment to the bank, and that the credit may be withdrawn if the item is not paid to the bank.

The custom of banks to take checks from their depositors as cash, and allow them to draw upon the account subject to the final payment of the checks, is of great service, both in the banking business and to the customer. If the proof here were held sufficient to take the case out of the

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rule laid down in Farmers' Bank v. Newland, the rule would be valueless. The rule announced in that case was followed in Citizens' Bank v. Houston, 32 S. W. 397, 17 Ky. Law Rep. 701, and Weaver v. Louisville Banking Co., manuscript opinion, 1875. It is sustained by the weight of authority in other States. Third National Bank v. Vicksburg, 61 Miss. 112, 48 Am. Rep. 78; Freeman's Nat. Bank v. Nat. Tube Works, 151 Mass. 413, 24 N. E. 779, 8 L. R. A. 42, and cases cited, 21 Am. St. Rep. 461.

Under the evidence the court should have instructed the jury peremptorily to find for the defendant.

Judgment affirmed.

Decision No. 1473.

MILLER et al. v. KYLE et al.

(Supreme Court of Ohio. December 12, 1911.)

97 N. E. 372.

BILLS AND NOTES — ATTORNEY'S FEES.

It is the settled law of this State that stipulations incorporated in promissory notes for the payment of attorney fees, if the principal and interest be not paid at maturity, are contrary to public policy and void.

Sections 8106 and 8107 of the General Code, Ohio, do not give validity to such stipulations, but provide only that they shall not destroy the negotiable character of instruments in which they are incorporated.

Error to Circuit Court, Franklin County.

Action by one Miller and others against one Kyle and others. Judgment for defendants was affirmed in the Circuit Court, and plaintiffs bring error. Affirmed.

The plaintiffs in error were plaintiffs in the Court of Common Pleas. Their suit was upon a note and mortgage for $15,000, for which sum, with interest, judgment was awarded them. In both the note and the mortgage there was a stipulation for the payment of attorney fees if the maker should default in the payment of the principal sum. The court, though finding the default, and further finding that $550 would be a reasonable fee for the serivces of counsel for the plaintiffs toward the collection of the debt, refused to render judgment in any amount on account of such services. On petition in error the Circuit Court affirmed the judgment of the Court of Common Pleas.

Crum, Raymond & Hedges, for plaintiffs in error.

Vorys, Sater, Seymour & Pease and Fred C. Rector, for defendants in error.

SHAUCK, J. (after stating the facts as above). Whether the courts below erred in adjudging that the plaintiffs were not entitled to recover the fees of their counsel on the stipulation of the maker to be liable therefor, if default should be made in payment of the principal and interest, is the only question presented by the record.

In this State it has been firmly established, and long and constantly

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maintained, that such contracts for the payment of counsel fees upon default in payment of a debt will not be enforced. In State, for the Use of the Commissioners, v. Taylor et al., 10 Ohio 378, that conclusion was reached, and it was said that the enforcement of such contracts would result in evasions of the usury laws. The same conclusion was reached in Shelton et al. v. Gill et al., 11 Ohio 417, in Martin v. Trustees, 13 Ohio 250, and in Leavans v. Bank, 50 Ohio St. 591, 34 N. E. 1089. In all of these cases the contracts were denounced as contrary to public policy. The conclusion is well sustained by the obvious tendency of such contracts to encourage suits.

Counsel for the plaintiffs admit the authority of these cases and their effect to establish the common-law rule of this State as contrary to the view upon which they insist, but they assert that that rule has now been abrogated by sections 8106 and 8107 of the General Code, which were enacted as sections 3171 and 3171a of an act entitled "An act to establish a law uniform with the laws of other States on negotiable instruments," passed April 17, 1902. 95 O. L. 162. The former of these sections prescribes the requisites for a negotiable instrument, among which requisites is that the instrument "must contain an unconditional promise or order to pay a sum certain in money." The latter relates to the required certainty, and it provides that "the sum payable is a sum certain within the meaning of this chapter, although it is to be paid: . . . (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity." These sections will be at once recognized as a part of the negotiable instruments act recently enacted, with but slight differences, in many of the States.

Counsel for the plaintiff assert with confidence, and no one seems to doubt, that the general assembly may by legislative enactment change the common-law policy of the State with respect to a subject of the character of this. Proceeding with the contention that the legislature of this State has exercised that power by enacting the sections referred to, they call attention to the wide diversity of decisions in the different States respecting the validity of such stipulations for the payment of attorney fees, and suggest that if there had been no intention to change the law of this State upon that subject the fifth paragraph of section 8107 would have been omitted. A diversity of decision to which that paragraph has obvious reference was not with respect to the validity of stipulations for the payment of attorney fees, but whether the insertion of such a stipulation in an instrument destroyed its negotiable character. One writer on the subject of the act says: "The courts in the various States have been nearly evenly divided on the question of the negotiability of instruments with such provisions." Selover, pp. 59, 60. We are not advised that any court of this State has ever been called upon to determine that question. But whether, by the common law of the State, a stipulation for the payment of attorney fees destroyed the negotiable character of an instrument in which it was incorporated, or whether that question was undetermined, there was, in either case, an important purpose to be accomplished by the fifth paragraph of the section, without assuming that it was intended to give validity to stipulations which were previously invalid. To preserve the negotiable character of an instrument notwithstanding the incorporation of a stipulation for the payment of attorney fees the language of the section is entirely appropriate. It contains no language indicative of an intention to change the rule of the common law with respect to the validity of the stipulation.

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It is suggested that the general assembly must be presumed to know the common law of the State, and that every section of a statute should be regarded as evincing an intention to change it. That would, indeed, be a novel rule of interpretation, and in the days of the codifier it would reach results most confounding. Its impracticability as a rule of interpretation will at once appear, if an attempt be made to apply it to the act of which these two sections form a part. That act has been in force in this State for more than nine years, and to the present time our attention has been called to but one respect in which it changes the common law of the State upon the subject of negotiable instruments. Quite different from the rule suggested is the rule which the wisdom of generations has established: That statutes in derogation of the common law shall not by construction receive a meaning beyond that of the terms which they employ. Certainly this does not mean that such statutes are to be construed in a spirit of hostility, but in its application to the present case it cannot mean less than that the legislative act, which contains language appropriate only to saving the negotiable character of instruments which contain stipulations for the payment of attorney fees, should not be construed to impart validity to such stipulations, notwithstanding an established rule of the common law to the contrary. It seems to be conclusive of this subject that if, seeking uniformity upon a subject not suggested by the terms of the statute, we should adopt the view urged by counsel for the plaintiffs, the desired result would not be attained; for in some of the States there has been added to the clause which constitutes the fifth paragraph of section 8107 in our statute the express provision that it shall not be so construed as to give validity to stipulations for the payment of attorney fees.

Judgment affirmed.

SPEAR, C. J., and PRICE, JOHNSON, and DONAHUE, JJ., concur.

Decision No. 1474

KERBY v. WADE et al.

(Supreme Court of Arkansas. January 1, 1912.)

142 S. W. 1121.

MORTGAGES — BILLS AND NOTES — DEMAND NOTES.

A mortgage recited that it was on condition that plaintiff, who was indebted to the mortgagees in a certain sum, evidenced by a note of even date, "due after date with interest," should pay such moneys "at the times and in the manner aforesaid, and the above conveyance shall be null and void." Held, that the mortgage, in not naming any date for maturity of the debt, was so contrary to the ordinary course of business as to put an assignee thereof upon inquiry, which would have shown that the note was then past due, so that he was not an innocent transferee for value.

Demand paper is overdue if it remains unpaid for an unreasonable time after its date, or the date of delivery.

If the assignee of a mortgage had notice that the secured note was past due when he purchased the mortgage, he took it subject to any defenses available against the payee by the original maker.

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Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by George Wade and others against J. P. Kerby and others. From a decree for plaintiffs, defendant named appeals. Affirmed.

The appellees brought this suit against Henry Green, W. A. Parker, and J. P. Kerby to set aside a mortgage for alleged fraud, misrepresentation, and deceit practiced upon appellee Wade in its execution. It is alleged, substantially, that Wade applied to one Henry Green and one W. A. Parker, two practicing attorneys, to borrow the sum of $100; that Green and Parker informed Wade that, in order to enable them to obtain the money desired by plaintiff, he would have to execute a realty mortgage to them in the sum of $100; that the plaintiff executed the mortgage on his home place, which is described, and delivered same to Green and Parker, and expected to immediately obtain the sum of money for which he had given security, but that Green and Parker did not furnish same to him, saying that they would get the money for plaintiff, but failed to do so; that plaintiff insisted on getting the money or having his papers returned; that Green and Parker failed to furnish the money or to return his mortgage; that he made frequent demand upon them to surrender the mortgage or satisfy same; that defendants, instead of doing this, assigned the mortgage to appellant Kerby for an alleged consideration of $100; that the assignment was wholly fictitious and fraudulent; that the placing of the mortgage on record by Green and Parker was a fraud upon appellee Wade; that Kerby, the alleged assignee, took the assignment from Green and Parker with full knowledge of the fact that Green and Parker had failed to loan appellee Wade any money, and with full knowledge that the mortgage was without any consideration; that the alleged assignment of Green and Parker to Kerby was without consideration and void; that the same was a fraudulent scheme between Green and Parker to defraud appellee Wade.

Appellee further alleged that he had sold the land to W. D. Lawler, and had executed to him a warranty deed, and was responsible to him on said warranty. That appellee Wade was damaged by reason of the fraudulent acts of Green, Parker, and Kerby in the sum of $200. He prayed judgment for damages in this sum, and that the mortgage be canceled, etc. Appellee made the mortgage an exhibit to his complaint.

Green answered, setting up, substantially, that the mortgage was executed in consideration of services to be performed by him in procuring a loan for appellee Wade; that he never "used the mortgage and note, or attempted to do so, except to borrow the money and serve the plaintiff, and that he would have secured the money on the note and mortgage had plaintiff not interfered and refused to go on with the matter." He denied all the other material allegations of the complaint.

The appellant J. P. Kerby answered, denying that the assignment of the mortgage was fictitious and fraudulent; denying that he took said assignment with full knowledge that no money of any character whatever had been loaned to Geo. Wade by Green and Parker; and denying the other allegations of the complaint as to the assignment. But he does not set up affirmatively that he was an innocent purchaser for value.

The court, after hearing the evidence, rendered a decree in favor of the appellees, cancelling the mortgage, and directing the appellant Kerby to turn over to appellees the mortgage and note. The appellant Kerby prosecutes this appeal.

W. T. Tucker, for appellant.

Lawrence Maloney, for appellees.

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WOOD, J. (after stating the facts as above). The mortgage recites, among other things, as follows: "The sale is on the condition that, whereas, I am justly indebted unto the said G. Henry Green and W. A. Parker in the sum of one hundred dollars, evidenced by a note of even date herewith, due after date with interest. Now, if I shall pay said moneys, at the times and in the manner aforesaid, then the above conveyance shall be null and void," etc. The mortgage was dated November 11, 1908. The alleged assignment was January 9, 1909. It will be observed that the mortgage recites that the note which it was executed to secure was "due after date." According to the mortgage, therefore, there was no date fixed for the maturity of the note which it was given to secure. It was not even due on demand; at least, it could not be considered as anything more than demand paper, if that.

It is true appellant Wade, in one part of his deposition, stated that "the mortgage was to come due the 1st of November," in 1909; but other parts of his testimony show that the note was to be paid when the loan was procured for him by Green and Parker, and there was no time fixed when that loan should be procured. It was to be procured for him as soon as possible. Now the mortgage was incident to the debt, and could not have been due after the debt which it was given to secure was due. The mortgage was subject to foreclosure at and after the time when the note became due, whenever that was. Inasmuch as the mortgage did not name any date for the maturity of the debt which it was given to secure, it was so peculiar and out of the ordinary course in this respect as to put appellant upon inquiry, which, if pursued, would have disclosed circumstances to prove that the note was past due.

The mortgage itself and the testimony of appellee Wade, with reference thereto, were sufficient to warrant the court in finding that appellant purchased the mortgage (if he did purchase it) after the debt which it was given to secure was past due; and that therefore appellant was not an innocent purchaser for value. Appellant was notified by the mortgage itself that, at most, he could only be purchasing a security for demand paper.

"It now seems to be definitely settled, at least in this country," says Mr. Tiedeman, "that demand paper is overdue if it remains unpaid for an unreasonable time after its date, or the date of delivery." Tiedeman on Bills and Notes, § 108. See, also, Daniel & Douglass, Elements of the Law of Negotiable Instruments, § 240, citing 1 Parsons on Notes and Bills, §§ 263, 264.

The circumstances under which this note was executed show that it was past due when appellant purchased the mortgage; and he therefore took it subject to any defects that might have been set up by the maker as against the payee.

It could serve no useful purpose to set out and discuss in detail the evidence concerning the fraudulent execution of the mortgage. It sufficeth to say that we have examined it carefully, and are of the opinion that the court was fully warranted in holding the same to be fraudulent and void.

The judgment is affirmed.

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Decision No. 1475.

HAWKINS v. SHIELDS. (No. 15,224.)

(Supreme Court of Mississippi. January 15, 1912.)

57 So. 4.

BILLS AND NOTES — "INDORSEMENT" — EVIDENCE.

The "indorsement" of a bill or note is not merely a transfer, but it is a new contract, by which the indorser engages that the bill or note will be accepted or paid as the case may be; this engagement being conditioned upon presentment of demand and notice, and that the bill is a genuine and valid instrument.

As between the indorser and indorsee, it is immaterial whether the indorsement is made before or after maturity, save that, when the indorsement is made before maturity, the time of payment is fixed by the terms of the instrument, and, when made after maturity, payment must be demanded within a reasonable time, and notice of a refusal be given to the indorser in order to charge him.

Where an indorsement is made after maturity, the question of what is a reasonable time for a demand for payment may, when the facts are ascertained, be determined by the court as a matter of law; and where they are few and simple, it may likewise be determined by the court.

Parol evidence being inadmissible to vary or contradict a written instrument, a contract of indorsement, whether special or in blank, cannot be explained or denied by parol evidence, except to show failure of consideration or an irregular indorsement, or to impeach the indorsement for fraud, or to show that it is the subject-matter of a trust.

Where the payee of notes, who, for the purpose of using them as collateral, indorsed them in blank, and later, after paying the debt for which they were pledged and receiving them back, sold them with the indorsements upon them, this act was equivalent to a new indorsement, rendering him liable in case of the maker's failure to pay the notes at maturity.

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

Action by E. B. Hawkins against J. T. Shields. From a judgment for defendant, plaintiff appeals. Reversed.

Wyatt Easterling, for appellant.

McBeath & Miller, for appellee.

McLEAN, J. W. B. Johnson and wife were indebted to one Bluett Lee, and in order to secure payment of this indebtedness, on December 24, 1904, executed a certain deed in trust upon certain real estate. Subsequently to this Johnson and wife become indebted to J. T. Shields, and in order to secure the payment of this indebtedness also executed a certain deed in trust upon the same property, and at a still later date, being indebted to E. B. Hawkins, executed a third deed in trust conveying the same property. The indebtedness to Shields was evidenced by eight promissory notes, all of which were dated January 3, 1906. These notes were made payable to the order of J. T. Shields and were due at different dates; the first one being due on April 15, 1906, and the last one on December 15th of the same year. In January, 1907, Shields borrowed some money from the Citizens' Bank, and in order to secure the payment of this loan he indorsed, by writing his name across the back,

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the Johnson notes, and delivered them to the bank. Some time after that, Shields paid his note to the bank, and the Johnson notes were surrendered to him. In August, 1909, Shields proposed to dispose of these notes to Hawkins. The matter was consummated, and Hawkins became the owner of the notes. Shields delivered the notes, with a written indorsement thereon. At the time of the purchase of these notes it was suggsted by Hawkins that it would be necessary for the transfer of the notes to be marked on the record, and that this transfer would have to be acknowledged, and that it would cost something to have this done; but after advising with an attorney it was ascertained that it was not necessary for an acknowledgment to the transfer to be made on the record. The real estate covered by the several mortgages was sold under the first trust deed, and Hawkins became the purchaser. The property did not bring enough money to pay the debts covered by the first and second trust deeds, and the result was that Hawkins demanded of Shields the balance that was due on the Johnson notes, transferred by Shields to Hawkins.

The defense set up by Shields was that at the date of the transfer Shields was not to be responsible as an indorser of the notes. There is no evidence in the record to show that at the time of this transfer there was any understanding at all between Hawkins and Shields as to the latter's liability on the notes as indorser. Hawkins never said anything to Shields about being liable as indorser until after the property was sold under the trust deed, but shortly thereafter he made demand upon Shields for the difference. Shields' testimony on this point is as follows: "There was no agreement between me and you that I was to become responsible. He says: 'I know it, but the place did not bring enough to pay the two notes; but, as your indorsement is on the notes, I will look to you for it.' I says: 'If I was legally or morally responsible to you, I would pay you; but I am neither legally or morally responsible for it. You did not ask me to indorse them to you, and for that reason I will not pay it, unless the law says so.'" Objection was made to the testimony of Shields, objection overruled, and exception taken.

The court gave the following instruction for the defendant: "The court instructs the jury for the defendant, Shields, that if they believe from the evidence that Shields did not indorse said notes for the purpose of transferring same to E. B. Hawkins, and that the only requirement of Hawkins from Shields was that Shields was to make the transfer on the record of the deed of trust, then plaintiff cannot hold Shields on said indorsement, and the jury will find for the defendant." And a verdict was returned for the defendant, and from the judgment entered thereon this appeal is prosecuted.

In the first place, it may be said there was no evidence at all, even if it were admissible that the indorser, Shields, was not to be responsible in the event the makers failed to pay the notes. There was in truth and in fact no agreement one way or the other about this matter. Evidently the conversation relating to having the record show a transfer of the notes was for the purpose of complying with section 2794 of the Code of 1906, to the effect that "the assignor shall be required by the assignee to enter the fact of the assignment on the margin of the record of the lien, and in default of making such entry in satisfaction of the lien or instrument evidencing it, entered by the original creditor, shall release the same as to subsequent creditors and purchasers for value without notice," etc.; and under section 2795 of the Code it is provided that "all

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assignments of any indebtedness secured by a mortgage (etc.) shall be entered on the margin of the record of the lien within thirty days from the date of such assignment, and for a failure so to do the assignee shall forfeit to the debtor ten per cent. of the amount of said indebtedness." We must conclude from the evidence in this case that the conversation had between Hawkins and Shields, as to letting the record show the assignment, was simply for the purpose of complying with the provisions of these two statutes.

The indorsement of a bill or note is not merely a transfer thereof; but it is a fresh and substantive contract, embodying all of the terms of the instrument in itself. The indorsement of a bill is equivalent to the drawing of a new bill by the indorser upon the drawee in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee. So entirely distinct and independent is the contract of an indorser of a note thereof and the maker that at common law a separate action against each was indispensable. The indorser engages that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditioned upon due presentment of demand and notice. It also engages that it is in every respect genuine, that it is the valid instrument it purports to be, that the ostensible parties are competent, and that he has the lawful title to it and the right to indorse it. Such is the nature and effect of the contract of indorsement as shown by all of the authorities.

As between the indorser and indorsee there is no difference in the contract of indorsement, so far as the rights and liabilities of the indorser are concerned, when the indorsement is made before and when made after maturity; the only difference being that, when the indorsement is made before the maturity of the bill or note, the time of payment is fixed by the terms of the instrument itself, but when the indorsement is made after maturity, payment must be demanded of the payor within a reasonable time and notice, in the event of a refusal given to the indorser in order to charge him. In such an instance the instrument is regarded as being equivalent to one payable on demand. Daniel on Negotiable Instruments (5th Ed.), § 611, and authorities cited in notes; 7 Cyc. 822 et seq.; Baskerville & Whitfield v. Harris, 41 Miss. 535.

The great weight of authority is that, when the facts are few and simple, it is within the province of the court to determine what is reasonable time; but, when they are complicated and doubtful, they should be left for the ascertainment and judgment of the jury under proper instructions from the court. Further, that when the facts are ascertained it is for the court to determine what is reasonable time as a matter of law. Daniel on Negotiable Instruments, § 612; Baskerville & Whitfield v. Harris, 41 Miss. 535.

It is elementary that parol evidence is never admissible to contradict or vary the terms of a valid written instrument. While this general principle is admitted to be applicable to all contracts written out in full, some authorities are not willing to apply this principle to those contracts which are raised from implication by the operation of law, such, for instance, as indorsements in blank. Such seems to be the rule in Pennsylvania, North Carolina, Florida, Colorado, and Connecticut; but this doctrine is certainly opposed to the great weight of authority, and also to the better reason. When it appears from an inspection of the paper that

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the party is an indorser, there seems to be no just ground for the distinction taken between the implied contract from his mere name thereon written and contracts written out in extenso. The signature of the indorser upon the bill or note is as marked a manifestation of the intention of the party as if the contract were set forth in express words. All of the authorities hold that, though there be nothing but the indorser's signature, the indorser's contract is as fully expressed as that of the drawer of the bill or maker of a note payable to bearer; and it is a general rule, supported by the great weight of authority, that the indorser in a suit brought by the indorsee, whether mediate or remote, cannot show by parol that it was agreed that the indorser should not be liable, and that his indorsement was without recourse on him. Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Daniel on Negotiable Instruments, § 709; Tiedeman on Commercial Paper, § 274. Indeed, this is no new question in this State, as has been so declared by this court. Baskerville & Whitfield v. Harris, 41 Miss. 530.

In denying the admissibility of parol evidence to vary or to contradict the terms of a contract of indorsement, we, of course, do not extend this rule so as to exclude evidence offered to show want or failure of consideration, or in cases of irregular indorsement (Thomas v. Jennings, 5 Smedes & M. 627; Polkinghorne v. Hendricks, 61 Miss. 366; Holmes v. Preston, 70 Miss. 152, 12 South. 202; Richardson v. Foster, 73 Miss. 12, 18 South. 573, 55 Am. St. Rep. 481; Pearl v. Cortright, 81 Miss. 300, 33 South. 72), or to impeach the original or present indorsement on the ground of fraud, nor to exclude the parol evidence to the effect that the indorsement was upon trust for some special purpose, as from a principal to an agent, or for collection merely, or as an escrow upon an express condition that has been complied with, and in cases of fraud, and perhaps in other instances.

The evidence in this case shows that the indorser wrote his name in blank across the back of the notes and delivered the same to a bank, when he hypothecated these notes as collateral security for an accommodation extended by the bank; that when he paid the bank its debts these notes were surrendered to the indorser, Shields; that the indorser did not erase his indorsement, but the same remained on the notes, and when subsequently he made the contract with the appellant, Hawkins, he, the indorser, did not rewrite his name or reindorse the notes, but delivered the notes with the old indorsement thereon — it being a blank indorsement. It was not at all necessary to reindorse the notes. The delivery of the notes with the old indorsement thereon was an adoption of the former indorsement, and was equivalent to a new indorsement. No authority is needed for so obvious a proposition.

The instruction given for appellee was in direct conflict with this opinion, and the cause is reversed.

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Decision No. 1476.

MILES et al. v. DODSON.

(Supreme Court of Arkansas. February 26, 1912.)

144 S. W. 908.

BILLS AND NOTES — PAYMENT.

Where the holder of a negotiable note acquired the same after maturity, from one who became a bona fide holder for value and without notice before maturity, he is protected by the strength of his transferror's title.

One who takes negotiable papers before maturity in payment of or as security for an antecedent debt, without notice of any defect, receives it in due course of business and is a bona fide holder.

One who purchased a negotiable note after maturity from the transferee of a partnership which acquired the note in good faith and for value before maturity was protected as a bona fide purchaser, though he was a member of the partnership.

Where the maker of a note paid the amount thereof to the original payee without requiring the production of the note, such payment is at the risk of the maker and does not discharge the note as against a transferee thereof.

Appeal from Union Chancery Court; James M. Barker, Chancellor.

Action by C. W. Dodson against F. W. Miles and others. From a judgment for plaintiff, defendants appeal. Affirmed.

R. G. Harper, for appellants.

W. E. Patterson, for appellee.

FRAUENTHAL, J. This was an action upon a note originally instituted in the Circuit Court by C. W. Dodson against F. W. Miles and the other makers thereof. The note is a negotiable instrument for $575.25, dated August 20, 1903, and due January 1, 1905, payable to the order of E. H. Smith. The plaintiff claimed that he was an innocent purchaser of the note. The defendants alleged payment of the note and that plaintiff had acquired it after its maturity and after notice that it had been paid. They also alleged that the note had been assigned by said E. H. Smith to Dodson & Son, a partnership of which the plaintiff was a member, as collateral to secure a principal note executed by said Smith to said partnership; that a great many other notes and shares of stock had at the same time been transferred to said partnership as collateral to secure said principal note; and that the partnership had collected on the other collateral a sufficient amount to pay the principal note. Without objection, the cause was transferred to the Chancery Court, and, by the consent of all parties, that court appointed a master to make and state an account of all payments which had been made and all sums which had been collected on all said collateral notes and shares of stock which had been transferred by said Smith to Dodson & Son, and also of all payments made by the defendants upon the note involved in this suit. Testimony of a number of witnesses was taken by the master relative to these matters, and he made a report in which he set out the various notes and shares of stock which had been transferred by said Smith to Dodson & Son

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to secure his principal note to them, and also the various sums which had been collected thereon. From this he found that there was still due and unpaid on said note executed by Smith to Dodson & Son the sum of $1,781.89. The master further found that in March, 1904, the defendant Miles had paid to said Smith the full amount of the note herein sued on. He thereupon reported that plaintiff was not entitled to recover on said note. The chancellor approved the findings of fact made by the master, but overruled the conclusion of law at which he arrived. He found that the plaintiff was an innocent purchaser of the note before its maturity, and thereupon rendered judgment in his favor for the amount thereof.

It appears that on or about September 1, 1903, said E. H. Smith became, or was then, indebted to Dodson & Son in the sum of $7,000, and executed his note therefor to them. In order to secure the payment of that note, he transferred to Dodson & Son on the same day a number of notes of various parties, which were payable to him, and also some shares of stock in two or more corporations. Amongst the notes thus transferred as collateral to Dodson & Son was the note upon which this suit is instituted. At the time of making said transfers Smith also executed a written power by which he authorized said Dodson & Son, or their assigns, to sell said collaterals, or any of them, upon default being made in the payment of said principal note executed by him to them. The testimony tended further to prove that shortly afterwards Dodson & Son placed these collateral notes in the hands of a firm of lawyers for collection. These attorneys testified that they used every reasonable effort to collect these notes and succeeded in collecting about $1,000 thereon by August, 1904. On September 1, 1904, Dodson & Son had a settlement with said Smith of the collections which had been made by them upon the various collateral notes, which, being credited upon said principal note, left a balance due thereon of $6,000. In renewal of the balance thus found due upon said note, Smith, on said day, executed to Dodson & Son his note for $6,000, due January 1, 1905. The note herein sued on, which had been transferred as collateral to secure the payment of the original note for $7,000, was still retained by Dodson & Son as collateral to secure the payment of the renewal note for $6,000. Some of the other collateral notes were also retained by them, and other notes were transferred to them as collateral for the payment of the renewal note. About that time Dodson & Son borrowed from, or became indebted to, the Ouachita Valley Bank in the sum of $4,346.62, and executed their note to it therefor, and in order to secure same transferred to the bank the said note for $6,000 executed to them by Smith, and also the collateral notes attached thereto, amongst which was the note herein sued on. Later, and in February, 1905, Dodson & Son having made default in the payment of their note to the bank, the collateral notes were sold by the bank under the power granted by Smith to Dodson & Son and their assigns. At this sale the plaintiff became the purchaser of the note herein sued on. The testimony upon the part of the defendant tends to prove that in March, 1904, F. W. Miles paid the amount of the note herein sued on to said Smith for the purpose of satisfying it. The note was not then in the possession of Smith, but was then held by Dodson & Son, who had no knowledge of this payment. In excuse for or explanation of paying the

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note to Smith without knowing that he was the holder thereof, or for failing to demand the note at the time of its payment, Mr. Miles testified that "it was a slack piece of business, I guess, being the only reason I know."

It is urged by counsel for defendants that the plaintiff purchased the note from the bank in February, 1905, which was after its maturity, and, on that account, was not an innocent purchaser thereof, but took it subject to all defenses that the makers had against the original payee, Smith, and they cite to sustain this contention Nisbitt v. Brown & Norton, 30 Ark. 590, and Sorrels v. McHenry, 38 Ark. 127. But under the facts of this case we do not think that the makers can resist the payment of this note by any defense which they might interpose to it in the hands of the original payee, even if it should be held that the plaintiff obtained the note from the bank after its maturity. The note had been transferred by the payee, Smith, to Dodson & Son in Auguist, 1903, long prior to its maturity. If Dodson & Son were at that time holders thereof for value in the due course of business, then any subsequent purchaser thereof from them, even though he obtained it after maturity, would be protected against any defense which the makers might have or be entitled to assert against the original payee. As is said in 1 Daniel on Negotiable Instruments, p. 801: "As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established; and the power of transferring it to others with the same immunity which attaches in his own hands is incident to his legal right and necessary to sustain the character and value of the instrument and to protect the bona fide holder in its enjoyment." And the author further says: "If the holder acquired the paper after maturity from one who became a bona fide holder for value and without notice before maturity, he is then protected by the strength of his transferror's title." 1 Daniel on Negotiable Instruments, p. 776; Woodman v. Churchhill, 52 Me. 58; Hogan v. Moore, 48 Ga. 156. See also note to Y. M. C. A. Gym. Co. v. Rockford Nat. Bank, 46 L. R. A. 784.

At the time the note was transferred to Dodson & Son, it was assigned by Smith as collateral security for his debt to them. Dodson & Son were protected as innocent holders of this negotiable note, whether it was transferred to them to secure an indebtedness which was then incurred by Smith to them or a pre-existing indebtedness. In the recent case of Haldiman v. Taft, 143 S. W. 112, decided by this court, the rule is thus stated: "One who takes negotiable paper before maturity in payment or as security for an antecedent debt, and, without notice of any defect, receives it in due course of business and is a holder for value free from any equities of the maker or indorser." Brown v. Callaway, 41 Ark. 418; Winship v. Merchants' Bank, 42 Ark. 422; Tabor v. Merchants' Nat. Bank, 48 Ark. 458, 3 S. W. 805, 3 Am. St. Rep. 241; Evans v. Shean Hdw. Co., 65 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919; Exchange Nat. Bank v. Coe, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, 21 Ann. Cas. 934; White-Wilson-Drew Co. v. Egelehoff, 96 Ark. 105, 131 S. W. 208.

According to the undisputed evidence, Dodson & Son received the note herein sued on as collateral before its maturity in the due course of business and without any notice of any defense thereto; in fact, at

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that time there was no defect in or defense to this note. Thereafter Dodson & Son transferred the note to the bank, who, in February, 1905, transferred it to plaintiff, who was, in fact, a member of the firm of Dodson & Son, and in effect the note was thus returned to the original assignee by the bank. But whether we shall consider the plaintiff as a purchaser of the note from the bank or only as retaking it from the bank after payment of the indebtedness of Dodson & Son to it, and thus obtaining it as collateral to the note for $6,000 given to them by Smith, which he also obtained from the bank, the rights of the plaintiff would be the same, and he would be still protected as an innocent holder of the note herein sued on.

The note was constantly, after its assignment by Smith, the payee, in the hands of a holder who had acquired an interest in it, and such holder was alone entitled to the payment of it. After such transfer by the payee, the maker was not authorized to pay the same to the payee of the note. He could only make a valid payment to the holder of the note, and if he made a payment to one who at the time was not the holder of it, he did so at his own risk. Block v. Kirtland, 21 Ark. 393; Jenkins v. Shinn, 55 Ark. 347, 18 S. W. 240; State Nat. Bank of St. Louis v. Hyatt, 75 Ark. 170, 86 S. W. 1002, 112 Am. St. Rep. 50, 5 Ann. Cas. 296; Bank of Batesville v. Maxey, 76 Ark. 472, 88 S. W. 968; Winer v. Bank of Blytheville, 89 Ark. 448, 117 S. W. 232, 131 Am. St. Rep. 102; Buchanan v. Hicks, 136 S. W. 177, 34 L. R. A. (N. S.) 1200.

In March, 1904, the defendants claimed that Miles made payment of the note herein sued on to Smith, the payee. At that time Smith was not the holder or owner of the note. Long prior to that time he had transferred it to Dodson & Son, from whom plaintiff acquired it, and thereby plaintiff acquired all rights and interest which Dodson & Son then had in the note. The payment made by Miles to Smith, therefore, did not result in a payment of the note unless the principal note, which had been executed by Smith to Dodson & Son, has also been paid. This question of fact as to whether or not the principal note for $6,000 executed by Smith to Dodson & Son has been paid, was by consent of the parties, referred to a master. He took the testimony of all persons who had connection with the transaction and who had made collections on the collaterals which had been put up to secure that note. He stated an account of these collections and found that there was still due and unpaid on this principal note the sum of $1,781.89. This finding was approved by the chancellor. The master who made this finding of fact was appointed by consent of the parties. This court has held that the finding of fact of a consent master is as conclusive as the finding of a jury; that is, if there is any legal evidence to sustain it, the finding must stand. Greenhaw v. Combs, 74 Ark. 336, 85 S. W. 768; McDonald v. Kenney, 140 S. W. 999. Upon an examination of the evidence relative to this issue, we are of the opinion that there is sufficient legal evidence to warrant this finding of fact made by the master and approved by the chancellor. It follows that the chancellor was right in rendering judgment in favor of plaintiff for the note sued on.

The decree is, accordingly, affirmed.

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Decision No. 1477.

FOSTER COUNTY STATE BANK v. LAMMERS et al.

(Supreme Court of Minnesota. February 2, 1912.)

134 N. W. 501.

ACCORD AND SATISFACTION — BILLS AND NOTES.

The rule that, where the amount of a debt is undisputed, the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire debt, is not a satisfaction, because the agreement is without consideration, followed and applied.

It is not a consideration for an agreement to accept a less sum in satisfaction of the whole amount due on a promissory note that the maker agrees after maturity of the note to pay such lesser sum at a place other than that specified in the note.

An agreement by certain joint makers of a note to procure one of their number, though insolvent, to contribute his proportionate share of the note, and to furnish him money to make the payment, is not a consideration for an agreement by the payee to accept a less sum in satisfaction of the whole amount due on the note.

An allegation, in the answer in an action on a note, that one of the defendants had a dispute and a counterclaim to the demand against him, is insufficient to show such a bona fide dispute or counterclaim as would constitute a consideration for an agreement of the payee to accept a less sum in payment of the whole amount due.

That one of the makers of a note drew ink lines through the signatures of three other makers without the consent of the payee did not constitute a cancellation of the note as to them.

Appeal from District Court, Washington County; P. H. Stolberg, Judge.

Action by the Foster County State Bank against Albert J. Lammers and others. From an order denying a new trial after verdict for plaintiff, defendants appeal. Affirmed.

Harold Harris and H. H. Gillen, for appellants.

Edwin D. Buffington, for respondent.

BUNN, J. This action was brought to recover from defendants a balance of $449.18 and interest on a promissory note for $3,000 executed by defendants at Minneapolis, October 8, 1909, payable sixty days after date at Carrington, N. D., with interest at seven per cent. per annum until paid. The defendants other than McCue answered, admitting the execution of the note, and setting up the following defense: That on February 18, 1910, defendants Savage and Kinsey paid to plaintiff at St. Paul the sum of $879.70 upon the note, and on June 14, 1910, the other answering defendants, four in number, paid to plaintiff at Stillwater, Minn., upon the note, the sum of $1,798.48. That these payments were made pursuant to an agreement made at the time between plaintiff and defendants by the terms of which, in consideration of the promise of plaintiff to release defendants from all further liability on the note, defendants agreed (1) to pay said sums upon said note at St. Paul and Stillwater, Minn., instead of at Carrington, N. D., and to pay the same at the time aforesaid, instead of at some other time; (2) to procure defendant McCarthy, though insol-

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vent, to contribute his proportionate share of the payment, and to furnish him the money therefor; (3) to procure defendant Winston to pay his proportionate share of the note, although he up to that time had refused to pay his proportionate share "on account of a dispute and a counterclaim he had to this demand against him." That plaintiff, in consideration of these promises by defendants, agreed to accept the payments so made in full satisfaction and discharge of all liabilities of the six answering defendants on the note. That said defendants fully performed the agreement on their part. That the payments were accepted by plaintiff in full payment and satisfaction of the note, and that the answering defendants were thereby discharged from any and all liability thereon.

After plaintiff had rested, defendants offered to prove these allegations of the answer. The evidence was objected to, and ruled out by the court, and a verdict directed for plaintiff for the balance of the note remaining unpaid, with interest. A motion for a new trial was denied, and defendants appealed.

1. The trial court, in excluding the evidence offered and in directing a verdict, applied the rule that where the amount of a debt is undisputed the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire indebtedness, is not a satisfaction, and that such an agreement is not enforceable, because without consideration. It is, of course, clear that each defendant was liable to plaintiff for the full amount of the debt, and therefore that the agreement to release him from liability for the balance due would be an agreement to discharge an undisputed debt by the payment and receipt of a sum less than the whole.

Defendants urge that this rule should be repudiated by this court, and point to many forcible decisions in which the rule has been condemned as absurd, unjust, unreasonable, and false in principle. But there can be no doubt that the great weight of authority sustains the rule, and it is too well established in a long line of decisions of this court to justify us in repudiating it at this late day. Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Ness v. Minnesota & Colorado Co., 87 Minn. 413, 92 N. W. 333; Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100; Demeules v. Jewel Tea Co., 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; First State Bank v. Schatz, 104 Minn 425, 116 N. W. 917; Allen v. Batz, 133 N. W. 79.

2. Defendants contend that a consideration for plaintiff's agreement is found in the fact that defendants agreed to make the payments in Stillwater, Minn., instead of Carrington, N. D., and that therefore the case falls within a well-established exception to the rule. It is true that an agreement by the debtor, made before the maturity of the note, to pay at a place other than the place specified in the note, or at another time, is deemed a sufficient consideration for an agreement by the creditor to accept a sum less than the whole in full payment. But clearly this consideration is lacking when the note is past due. Before maturity the creditor cannot compel payment at any other time or place than those named in the note, but after maturity he is legally entitled to collect his debt wherever and whenever the debtor is found. The agreement to make the payment at Stillwater was, there-

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fore, no more than defendants were legally bound to do, and was in fact a convenience to defendants, rather than a burden, and a loss to plaintiff, rather than an advantage.

3. The next contention is that the agreement to procure the defendant McCarthy, though insolvent, to contribute his proportionate share of the note, and to furnish him money to make the payment, is a consideration for the alleged agreement of plaintiff. We do not sustain this contention. Plaintiff was legally entitled to collect the entire note from any one or more of the defendants, and it is not claimed that any of them were insolvent, except McCarthy. Therefore an agreement by the defendants, other than McCarthy, to induce him to pay his share, or to furnish him the money for that purpose, is not an advantage to plaintiff or a disadvantage to defendants. As far as concerns McCarthy himself, his insolvency might create an exception to the rule; but there was no offer to prove that McCarthy agreed to pay the less sum in satisfaction of the greater. The defense was pleaded as a defense of all the answering defendants, and the offer made on behalf of all. It was evidently not the intention of counsel by their pleading or the offer to make this defense on behalf of McCarthy, and, as it is clearly unavailable to the other defendants or the defendants jointly, we hold that there was no error in excluding the evidence.

4. The allegation in the answer that defendant Winston had "a dispute and a counterclaim to the demand against him" is a wholly insufficient pleading of a counterclaim or set-off in that defendant's favor. It is also, in our opinion, an insufficient pleading of such a bona fide dispute or counterclaim as would bring the case within the rule that an agreement to accept a sum less than the entire claim in full payment of an unliquidated demand, or one in regard to which there is a bona fide dispute, is valid. Defendant Winston might have pleaded and proved any defense or counterclaim that he had, and he might have pleaded and proved a bona fide dispute or counterclaim in orer to show a consideration for the release as to him; but we hold both pleading and offer insufficient to admit evidence of either defense. In no case could this defense avail the other defendants.

5. There is no merit in the claim that the note was canceled. One of the defendants drew pen and ink lines through the signatures of three of the defendants, but the evidence is conclusive that this was done without the knowledge or consent of the payee. Nor is there anything in the point that the payments were made to the Stillwater bank in checks instead of in cash.

We are of the opinion that the trial court correctly excluded the evidence offered and correctly directed a verdict for plaintiff.

Order affirmed.

PHILIP E. BROWN, J., took no part.

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Decision No. 1478.

PETERSON v. TILLINGHAST.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1911.)

No. 2,138.

192 Fed. 287.

BILLS AND NOTES — ACCOMMODATION.

It is a defense to a note in the hands of a national bank's receiver that it was given in good faith to the bank solely for its accommodation, and on agreement that the bank would provide for its payment, and never call upon defendant maker to pay it.

Where a maker sued on a note by the payee bank's receiver claimed that the note was given for the bank's accommodation, and the receiver claimed that it was given for the benefit of another corporation in which the maker was interested, it was error to refuse to permit him to show the amount of the company's stock for comparison with his holdings.

In error to the Circuit Court of the United States for the Western District of Michigan.

Action by Philip Tillinghast, receiver, against A. W. Peterson. Judgment for plaintiff, and defendant brings error. Reversed and new trial awarded.

Aaron A. Ferris (M. M. Riley, on the brief), for plaintiff in error.

C. B. Wilby (Philip Tillinghast, on the brief), for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

PER CURIAM. This action was brought by Tillinghast, as receiver of the First National Bank of Ironwood, Mich., to recover upon two promissory notes made by Peterson. All questions concerning one of the notes were eliminated in the court below, and the present controversy relates only to the other. It is a demand note, dated October 1, 1908, payable to the order of the bank for $2,500, with six per cent. interest. At the close of all the evidence offered, a motion to direct a verdict for the full amount of the note with interest was granted; and the amount was subsequently reduced to the extent of a deposit existing in the bank in favor of Peterson. Judgment was thereupon entered for the balance due, $2,693.75, with interest from the date of the verdict.

To the declaration a plea of the general issue was interposed, with notice of special defense that the note was executed solely for the accommodation of the bank, and upon an express agreement that the bank would provide for its payment and never call upon Peterson to pay the note. Special instructions to the jury were requested in Peterson's behalf and refused; and under the assignments of error several questions of law are presented, which, so far as necessary to pass upon, will be stated as we progress. The main complaint of error concerns the instruction to the jury to return a verdict in favor of the receiver.

Peterson testified that the cashier of the bank asked him if he would sign a note for the bank for $5,000, to which Peterson replied that he

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did not think his note for that amount would look well in the bank, because he had some paper there already. The cashier then stated "that he did not propose to have it in the bank," indeed, that he did not know whether he would use the note at all, but that, if he did, he would use it "for the purpose of raising money from some outside bank." Peterson told him that he "might sign a note for half that amount to accommodate them, if he thought that that would do them any good;" and, further, that the cashier told him that, if he gave a note, he "should never have to pay, because that would be taken care of by the bank." Peterson testified, also, that he had known the bank since 1890, that he had several deposits there, and that "the reputation of the bank for solvency and prosperity was first class;" also, that the president and cashier "were considered among our best men and were considered wealthy." It was admitted by the receiver as a fact:

"That this bank was then (at the date of the transaction) of high reputation, and that Mr. Peterson had entire confidence in its solvency and responsibility, and that he had no reason to have any suspicion on that subject."

Peterson was asked on cross-examination whether he had been requested to sign the note "for the Harqua Hala Mining Company so the money could be raised to pay its floating debt," and also whether he had not repeatedly admitted that the note was given in the interest of that company; but he denied that he had been so requested or that he had made any such admission. He did admit, however, that at the date of the note he was interested in the company to the extent of 110 shares of the par value of $10 each, and that he had about the same amount of its bonds. The receiver gave proof on rebuttal by himself and two other witnesses tending to show that Peterson stated to them:

"That he gave the $2,500 note in question at the request of Mr. Larson (the bank's cashier) for the benefit of the Harqua Hala Mining Company . . . for the purpose of having such note discounted by the bank, to raise money for the mining company."

In the course of Peterson's testimony this occurred:

"The Court: And your understanding was that he (Larson) was to send it; if he used it (the note), he was to send it to a bank at Milwaukee, or somewhere else, to be discounted? A. That was his statement that, if he used it at all, he would use it outside of the city, and I think he mentioned Milwaukee, but that I am not sure of. The Court: Did you ever understand that it might be discounted at some bank away, whatever one he selected? A. Yes, sir."

It was stipulated that at the time of the failure the bank's books showed a capital of $50,000 and a surplus of $20,000; that claims had at the time of the trial been allowed for $614,000; and that, including the proceeds of 100 per cent. assessment, the bank will not pay more than 30 per cent. to 35 per cent. of its liabilities; that "the bank was insolvent at all times from and after October 1, 1908" — the date of the note. It appeared by the books of the bank that this $2,500 note was passed into its assets in October, 1908; and it was conceded by Peterson's counsel that a national bank examiner on November 20, 1908, "found among the assets of the bank the $2,500 note in question, and in his examination treated it as part of the assets of the bank."

The learned trial judge reached the conclusion that:

"In the ordinary case of an accommodation note given to a national bank, it is against the theory and policy of the law and against the proper

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rules of public policy to permit the giver of the note to deny liability upon such note."

And later the court stated that since it "appears by Peterson's statement that this note was given by him as an accommodation to the bank, and for the purpose of becoming a part of the assets of the bank, I direct you that he cannot now be permitted, against the receiver of the bank, under the circumstances of insolvency here existing, to deny liability; and you will, therefore, render a verdict in this case for the sum," etc.

We think the action of the court below must be tested by the decision in Rankin v. City National Bank, 208 U. S. 541, 28 Sup. Ct. 346, 52 L. Ed. 610, affirming that of the Circuit Court of Appeals of the Eighth Circuit in the same case, though appearing in that court in the name of the predecessor of Rankin as receiver, viz.: Cherry v. City Nat. Bank, 144 Fed. 587, 75 C. C. A. 343. The controversy in that case had its origin in a complaint of a bank examiner of excessive loans made by the Guthrie Bank (Oklahoma Territory). The Guthrie Bank, through its president Billingsley, entered into an arrangement with the City Bank (Kansas City) under which the City Bank accepted a note in its favor for $30,000 signed by Billingsley, and opened on its books a special account for that amount in the name of the Guthrie Bank. The City Bank had been advised of the purpose of this transaction by letter from Billingsley stating (208 U. S. 542, 28 Sup. Ct. 347, 52 L. Ed. 610): "My reason for wanting this is that I have that amount of excessive loans that the department is kicking about. . . . You will not be out any money and loan and deposit will offset each other on your books." The Guthrie Bank had a general deposit with the City Bank, but it was agreed that the Guthrie Bank should not check against the special deposit account; the arrangement was characterized by Mr. Justice Holmes as "a scheme for a separate paper transaction." Billingsley subsequently sent a letter, with his note, to the City Bank stating that he had given the Guthrie Bank his check on the City Bank for the amount of the note, and that the Guthrie Bank would keep the $30,000 with the City Bank until the note was retired. In short, the scheme was carried into execution in the Guthrie Bank and in a manner in some respects not known to the City Bank. The three objectionable notes were taken out of the Guthrie Bank's assets and possession. The $30,000 note fell due and another loan for a less sum ($25,000) was, like the first note, credited in the special account to the Guthrie Bank under the same arrangement. The Guthrie Bank failed, and its receiver notified the City Bank that the note was not a liability of the Guthrie Bank, and that the City Bank would be held; and suit was brought to recover the amount of the apparent special deposit. The City Bank, having no knowledge of the Guthrie Bank's failing condition, on the day of the failure charged the note to the special account and returned the note duly canceled, closing the account.

The contract was treated in the decision as one made between the banks and as governing all that happened later (208 U. S. 545, 547, 28 Sup. Ct. 348, 52 L. Ed. 610); and say the court: "The whole business from beginning to end was and was intended to be a mere juggle with books and paper to deceive the bank examiner." Again (208 U. S. 546, 28 Sup. Ct. 348, 52 L. Ed. 610):

"As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner. If the City Bank should be held it would be held without ever having

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received a quid pro quo except in the most narrowly technical sense. The consideration would be the delivery of Billingsley's note by the Guthrie Bank."

The City Bank's liability was measured by its exact promise. It agreed to credit the loans against the notes which it held, on the express condition that no checks should be drawn against them, and that the notes at maturity should be charged against the account and so extinguished. Of this it was said (208 U. S. 546, 28 Sup. Ct. 348, 52 L. Ed. 610):

"We perceive no sufficient ground for substituting a fiction for the only promise the City Bank ever really made. If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

Recovery was disallowed both in the Court of Appeals and the Supreme Court. It is to be observed, however, that Mr. Justice Holmes twice called attention to the fact that counsel in the case (208 U. S. 545–547, 28 Sup. Ct. 348, 52 L. Ed. 610) "agreed that it was not contended that the contract was illegal because it enabled a false showing to be made of the condition of the Guthrie Bank." This disclaimer was regarded as having possibly affected the findings of the trial court, and for that reason that aspect of the case was not considered. This language immediately follows (208 U. S. 547, 28 Sup. Ct. 349, 52 L. Ed. 610):

"It would not help the plaintiff. McMullen v. Hoffman, 174 U. S. 639 (19 Sup. Ct. 839, 43 L. Ed. 1117)."

It cannot escape attention that the agreement of counsel not to contend that the contract between the banks was illegal could not have been because the contract did not provide for a special deposit account, and so enable "a false showing to be made of the condition of the Guthrie Bank." Further, it is indisputably true that the City Bank was in the very first letter it received advised of the exact object intended to be accomplished through the special account. It was also advised by letter that Billingsley had given the Guthrie Bank his check on the City Bank for the amount of the loan. Plainly, the City Bank knew that the special deposit was to be employed to retire the objectionable notes in the Guthrie Bank. The fact then that the learned justices concurring in the decision of the court did not consider "that aspect of the case" cannot aid the receiver here any more than it was allowed to help the receiver there; for the alternative reached there was that, if the contract was illegal the law leaves the parties as it finds them, because (208 U. S. 547, 28 Sup. Ct. 346, 52 L. Ed. 610) McMullen v. Hoffman was made the basis of the alternative. 174 U. S. 639, 670, 19 Sup. Ct. 839, 43 L. Ed. 1117.

So far then as Peterson's liability to the Ironwood Bank upon the theory that the note in question was a mere accommodation is concerned, we are unable upon the present record to preceive why this case is not ruled by the decision in Rankin v. City National Bank. True, it does not appear in either of the reports of the Rankin Case whether the insolvency of the Guthrie Bank involved loss to the depositors or not; but if it did not, and that fact was regarded as important, it is to be presumed that it would have been noticed.

In view of the City Bank's connection with the scheme resorted to in that case, as before pointed out, to deceive the bank examiner respecting

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the assets of the Guthrie Bank, the relevancy of the decision to the main contentions made here is apparent. It is contended that, when Peterson gave the accommodation note (making it payable to the order of the Ironwood Bank) for the purpose of being discounted in some other bank, he was chargeable with knowledge that false entries would have to be made in the books of the Ironwood Bank. It is also contended, and it was so held below, that there must be imputed to him knowledge that the proceeds of the discounted note were to be used to swell the assets of the bank; and consequently that the theory and policy of the law forbid him to deny liability. The inevitable logic of charging Peterson with the consequences of false entries and increasing the bank's assets, as the basis of precluding him from denying liability, is to brand the transaction with illegality.

Now, whatever effect might rightly have been accorded to the agreement of counsel in the Rankin Case not to contend that the contract between the banks was illegal, it is to be borne in mind that it was admitted by the receiver as a fact in the present case that at the date of giving the note the Ironwood Bank was "of high reputation, and that Mr. Peterson had entire confidence in its solvency and responsibility, and that he had no reason to have any suspicion on that subject." Can the receiver consistently both admit that there was no reason for suspicion, and insist that Peterson was bound to suspect — and so to forecast the consequences that might follow hsis act? There was certainly as much reason for applying a similar rule to the City Bank in the Rankin Case as there is for applying it to Peterson in this case, if indeed there was not more reason for doing so.

Furthermore, it is to be noticed that the bank did not in fact cause the note to be discounted, and that, instead of doing so, it pursued a course not originally contemplated by the parties, and never by Peterson. Despite this fact, it is insisted in effect that the original purpose to have the note discounted, and also the consequences of that sort of a transaction, forbid Peterson to deny that the note itself was intended to be given and held for the purpose of making it, as such, an asset of the bank. It is unnecessary to pusue the inquiry upon this subject further.

The infirmity of the opinion below was in treating Peterson's knowledge of the proposed discount of the note as conclusive evidence of an intent that the note should be used for an illegal purpose. If it can be said under the decision in the Rankin Case that the knowledge so imputed to Peterson would render him liable on the note, we think the question of the existence of such knowledge was one of fact for submission to the jury under appropriate instructions. The rules of estoppel urged are inapplicable, because (1) the case was disposed of upon a theory alone of law forbidding Peterson to deny liability; and (2), if the case had been submitted to the jury upon questions of fact, the evidence as adduced would have been lacking in some of the essential ingredients of estoppel. Henshaw v. Bissell, 18 Wall. 255, 271, 21 L. Ed. 835; Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 335, 336, 23 L. Ed. 927. As to misrepresentations made to the bank examiner and also to the comptroller and depositors through false entries in the bank's books and newspaper publications alluded to in the opinion below, the Rankin Case is in point. See, also, (although a case for deceit) Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108 (C. C. A. 6th Cir.).

There is another view of the evidence that requires some consideration.

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We refer to the issue presented, and upon which testimony was received as to whether Peterson had given the note for the benefit of the Harqua Hala Mining Company, in which he confessedly was interested. In addition to the testimony he was permitted to give in that respect, Peterson sought to show the amount of the company's capital stock for purposes of comparison with his holding. His right to do so was denied and exception reserved. In view of the fact that his denials were met by testimony as to admissions, we think it was competent for him to show the total amount of the capital stock. Since it might be found that the note was in fact given for the benefit of the company, it is possible that the question upon which the case was decided below will become unimportant. The ground upon which the motion to direct was granted rendered consideration of this other phase of liability unnecessary below.

The judgment must be reversed, and a new trial awarded, with costs.

Decision No. 1479.

LOUISVILLE & S. I. TRACTION CO. v. WALKER. (No. 22,096.)

(Supreme Court of Indiana. Jan. 23, 1912.)

97 N. E. 151.

CARRIERS — NEGLIGENCE.

Where in an action for injuries to a street car passenger, required to leave the car to board another car to complete her journey because of excavations in the track, the complaint alleged that the passenger was required to leave the car at a point where the street was rough and uneven and filled with loose dirt and stones, that she stepped on loose stones and slipped, and was injured, a special verdict that the injury occurred in the afternoon, on a clear day, while the sun was shining, that the street was being improved, that there was earth and broken stone lying loosely on the ground below the step, and covering the ground where the passenger was compelled to step in alighting, that the distance from the step to the broken stone on the ground was about two feet, that there was nothing to prevent her from seeing the condition of the street, and that she did see it before stepping down, and also the distance from the step to the ground, did not show her contributory negligence sufficiently to overcome a general verdict in her favor, since she remained a passenger, entitled to high degree of care for her safety, and her duty to exercise ordinary care in alighting was affected by the conditions and the fact that she could rely on the belief that she would not be required to alight at a dangerous place.

A special finding that a passenger, in attempting to alight from the car, stepped on a loose stone, or stones, and sprained her ankle, and a special finding that she stepped off the car and onto the street below, and stepped on broken rock in the street, and was injured, are inconsistent with each other, if the latter finding can be construed to mean that she was injured while walking, after she had alighted from the car, and a general verdict in her favor is not overcome, under the rule that, where answers to questions of fact are inconsistent with or contradictory of each other, the special findings do not overthrow the general verdict.

The duty of a carrier of passengers to exercise the highest degree of care for its passengers consistent with the practical operation of its road applies to street railroads.

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The rule which requires only ordinary care of railroad carriers in maintaining safe places for the ingress and egress of passengers to and from their trains at regular stopping places does not apply to the obligation imposed on a street railway company requiring a passenger to alight from a car to board another to complete her journey, because of excavations of the track and street; the obstructions of the street, the stopping of the car in the middle of a square, the condition of the place of alighting, and the requirement of the passenger to alight being brought about by the company.

Where a danger is small, ordinary care required to avert it is not great; but, where the danger to be anticipated is great, ordinary care may call for the highest vigilance and attempt to guard against it.

In an action for injuries to a street car passenger, required to alight from a car to board another car to complete her journey because of the excavations in the track, evidence held to justify a finding of actionable negligence, though the company was required to exercise only ordinary care, within the rule that a carrier need exercise only ordinary care in providing safe places for the ingress and egress of passengers to and from cars at stopping places.

Whether a street car passenger, injured while alighting from a car to board another to complete her journey, because of excavations in the street, was guilty of contributory negligence held, under the evidence, for the jury.

Appeal from Circuit Court, Clarke County; H. C. Montgomery, Judge.

Action by Grace M. Walker against the Louisville & Southern Indiana Traction Company. From a judgment for plaintiff, defendant appealed to the Appellate Court. Cause transferred to the Supreme Court, under Burns' Ann. St. 1908, § 1405, and affirmed.

Charles D. Kelso and George H. Voigt, for appellant. Alexander Dowling, for appellee.

COX, J The appellee recovered a judgment against appellant in the court below for damages for personal injuries, alleged to have been sustained by her while a passenger on one of appellant's lines of street cars.

A reversal of that judgment is asked by appellant, on the grounds that the trial court erred in overruling a motion made by it for judgment in its favor on answers to special interrogatories, which the jury returned with a general verdict for appellee, and that error was also committed in overruling appellant's motion for a new trial.

To the extent needed to be set out to intelligently exhibit and consider the questions involved in the appeal, the averments of the complaint are, in substance, that appellee entered one of appellant's street cars, to be carried as a passenger on it over the route and line regularly traversed by it to her intended destination at the terminus of the line, and paid the usual fare therefor; that, for the purpose of relaying its track and improving it, appellant had, at a certain point on the line, excavated and torn away that part of the street occupied by its track, and more than a foot on either side of it; that, through appellant's carelessness and neglect, the space on each side of its track was excavated six inches below the grade of the street, was rough and uneven, and filled with loose earth and loose stones, and thereby rendered unsafe and wholly unfit as a place for passengers to alight; that, in consequence of the work being done, the distance from the lowest step of the car to the ground alongside of it at the point where appellee was required by appellant to alight, as hereinafter stated, was not less than two feet, and too great for safety, as appellant

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well knew. While appellee was so being carried as such passenger, when the car in which she was traveling arrived at the point above described on appellant's line of road, which was near an intersecting street, the track was obstructed by cars of appellant, loaded with stone and other materials to be used on the street and track, which appellant had placed there, so that the car on which appellee was traveling could not proceed farther toward her destination; that by reason of this obstruction the car was stopped near the loaded cars, and appellee, with other passengers thereon, was wrongfully and negligently directed and required by the agent and collector of appellant in charge of the car to leave and get off of it at the said dangerous and unsuitable place, and to walk northward along the street and track, and past and beyond the loaded cars which obstructed the track, to another car of appellant, which was then standing and being held in waiting to carry the passengers to the end of their broken journey; that appellant, notwithstanding the conditions set forth, negligently failed to furnish any stool, step, or other means to enable appellee to safely get off and alight from the car, and its agents and employees in charge of the car wrongfully and negligently failed to offer and give to the appellee any assistance in getting off of said car and alighting therefrom. That, in obedience to the wrongful and negligent command of appellant, made by and through its agents in charge of the car, the appellee desiring to complete her journey and to be carried to her destination by appellant, attempted to get off and alight from said car onto the street, exercising due care in so doing, but that, in descending from said car and alighting on said part of said street adjacent to said track, without fault on her part, the appellee stepped upon a loose stone, or stones, negligently left by appellant along the side of said track, and thereby turned her foot and violently wrenched and severely sprained her ankle. A second paragraph of complaint was different from the first, only in that it alleged that the street was being improved by the city, and that the excavations were made by it.

The contention of counsel for appellant, in behalf of appellant's right to judgment on the answers to interrogatories, has a double basis. The first is the claim that the facts specially found by the answers show contributory negligence on appellee's part in alighting from the car. This claim we cannot sustain. The answers upon which reliance is placed by counsel may be summarized as follows: At the time of the accident, the eyesight of the appellee was good. The injury to her occurred about 4:30 o'clock of the afternoon of a clear day, and while the sun was shining. The street where she was injured was being improved, and there was earth and a lot of broken stone lying loosely on the ground in the street below the step, and covering the ground where she was compelled to step in alighting from the car. The distance from the step down to the broken stone on the ground was about two feet. There was nothing to prevent appellee from seeing the condition of the street, and she did see it before she stepped down, and also the distance from the step to the ground. She stepped down with a suit case in her hand. We find none of these to be out of real harmony with the general verdict. The complaint alleged that the appellee was required to leave the car at a point where the excavated street was rough and uneven and filled with loose dirt and stones. Not one of the above summarized facts is inconsistent with the conclusion which the jury might have and doubtless did reach by their general verdict for appellee, that, impelled to leave the car by the

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direction of appellant's employees, which unexpectedly broke her journey, she saw a place where she would have to alight which appeared to her to be safe, and which revealed to her nothing of its dangerous condition. The dirt may have, apparently to her, so embraced and been combined with the stones as to give her no suggestion or warning that it might be loose, and cause her foot to turn. She was required to leave the car on its west side, with the sun shining directly in her eyes. The circumstances of her alighting and the conditions present did not give time or opportunity for close inspection of the place where she must alight, and the rule of ordinary care, as applied to her conduct, did not require a close and critical study of the ground before she trusted herself upon it. She had not completed the passage of the trip on which appellant was carrying her, and she was still its passenger, to whom it owed a duty involving a high degree of care for her safety. And while she was not absolved from using ordinary care in getting off the car, such care is affected by the circumstances and conditions and the fact that she was entitled to rely to some extent on the belief that she would not be required to alight at an unfit and dangerous place.

The second basis of appellant's contention, that it should have had judgment on the answers, is that the facts established by certain answers are fatally at variance with those alleged as constituting the cause of action. The complaint avers that appellee suffered her injuries in the act of getting off the car, as she stepped therefrom upon the ground. It is earnestly contended by counsel for appellant that the answers show that appellee was injured by stepping on broken rock while walking, after she had alighted from the car. The interrogatories and the answers thereto, which are relied on to sustain this contention, are as follows:

"(22) Did the plaintiff then and there step off the car of the defendant traction company, on said Vincennes street, to the street below? Answer: Yes.

"(23) After so doing, did the plaintiff then and there step on the broken rock in the street? Answer: Yes.

"(24) In, as aforesaid, stepping on said broken rock, did one of plaintiff's feet turn and cause the injury she complained of? Answer: Yes.

"(25) Was the aforesaid injury the only injury plaintiff received on that occasion? Answer: Yes."

It may be said that no interrogatory was submitted to the jury, making inquiry as to how appellee was injured, which involved any other act than alighting, or any other place than the ground, to be reached at once by stepping from the car. This time and place and manner are indicated by all of them which relate to the question, unless the words "after so doing" in interrogatory No. 23 is such a departure as to show that she was injured while walking, after she had alighted. Taking all of the interrogatories and their answers together, it is not clear that they show, either that appellee was injured while walking, after the act of getting off of the car was completed, or that, if she was so injured, the variance was material. If she had stepped from the car to the ground, and then, in taking another step to make the transfer to the waiting car, had been injured by the unsafe conditions alleged to exist in the place where she was required to leave the car, it must be kept in mind that she was still appellant's passenger, doing what was required of her, as such, to complete her journey, and appellant owed her that degree of care incumbent upon

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a common carrier of passengers to guard her against injury. But we are not obliged to, nor do we, resolve either of these questions. Another interrogatory and its answer make it unnecessary. It may be conceded that the construction of the interrogatories and the answers to them, above set out, must be in accord with the contention of counsel, and still the general verdict must remain unaffected; for interrogatory No. 10 and its answer establish, in express and unequivocal words, that in attempting to alight from the car appellee stepped on a loose stone, or stones, and sprained her ankle. These conflicting interrogatories and answers neutralize and destroy each other, and the rule that, if answers of the jury to questions of fact are inconsistent with or contradictory of each other, the special findings will not overthrow the general verdict is too well established to require the citation of authorities. The court did not err in overruling the motion for judgment on the answers.

Involved in the action of the court in overruling appellant's motion for a new trial is the contention that the evidence fails to establish negligence on the part of appellant, and that it does show that appellee was guilty of contributory negligence. There is an earnest controversy between counsel for the opposing parties as to the degree of care by which appellant's duty to appellee should be measured. The rule which requires a carrier of passengers to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its road, and which is generally applied to the actual progress of the passenger on the journey undertaken, applies to street railroads. Citizens' Street Railroad v. Twinane, 111 Ind. 587, 13 N. E. 55; Prothero v. Citizens' St. Ry. Co., 134 Ind. 431, 33 N. E. 765; Conner v. Citizens' St. Ry. Co., 146 Ind. 430, 441, 45 N. E. 662; Citizens' St. Ry. Co. v. Jolly, 161 Ind. 80, 90, 67 N. E. 935; Anderson v. Citizens' St. Ry. Co., 12 Ind. App. 194, 197, 38 N. E. 1109; Hammond, etc., Ry. Co. v. Spyzchalski, 17 Ind. App. 7, 46 N. E. 47; Citizens' St Ry. Co. v. Hoffbauer, 23 Ind. App. 614, 620, 56 N. E. 54; Ft. Wayne Tr. Co. v. Morvilius, 31 Ind. App. 464, 68 N. E. 304; Crump v. Davis, 33 Ind. App. 88, 70 N. E. 886; Terre Haute Tr. Co. v. Payne, 45 Ind. App. 132, 89 N. E. 413; Thornton on Negligence, § 2072.

But it is contended by counsel for appellant that this rule is not the proper one to gauge the duty of appellant, under the facts in this case, but, on the contrary, that the rule which requires only ordinary care of railroad carriers, in providing and maintaining safe and convenient places for the ingress and egress of passengers to and from their trains at regular stopping places, should apply. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Pittsburg R. Co. v. Harris, 38 Ind. App. 77, 77 N. E. 1051; Elliott on Railroads, § 1590.

There are obvious reasons why the care to be exacted from appellant, under the circumstances of this case, should not be narrowly limited by this latter rule. The circumstances and conditions which produced appellee's injury in this case are more complex than those which usually admit an application of it. The obstruction of the street by work cars, which stopped the car on which appellee was a passenger at an unusual place in the middle of a square, the condition of the disembarking place, the compulsion under which appellee's journey was interrupted, and she was required to leave the car at an unusual and unfit place, were all brought about by appellant. But ordinary care ebbs and flows with the danger to be fairly anticipated by a man of reasonable prudence from the circumstances and conditions involved in each case. Where the danger

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indicated is small, ordinary precaution and care required to avert it are not great. Where the danger to be anticipated is great, ordinary care may call for the highest vigilance, activity, and unremitting attention to guard against it.

And, even yielding to the insistence of counsel that appellant's duty was satisfied with ordinary care, it cannot be ruled, as a matter of law, that the evidence does not show a violation of duty. There was evidence that appellee got on one of appellant's cars at one end of the line over which it ran to go to the other terminus, and paid her fare. She carried with her a light suit case. The car went part of the route to a point on one of the streets in which the track was laid, about midway between cross streets, where it was stopped close to two cars, which were in use by appellant in doing reconstruction work on its track in the street. This work was being done by appellant preliminary to a permanent improvement of the street by the city. It had excavated in the street, and had thrown out dirt and stones. The car on which appellee was a passenger had a door, platform, and steps at both ends. There were other passengers, besides appellee, who was nearer the rear end of the car than the front. When the car stopped, the conductor or motorman opened the door at the front end of the car, and called out generally to the passengers to change cars and transfer, but he did not direct them to go out at the rear end. No direction was given appellee as to which door she should take in leaving the car. The other passengers went out at the front door, and she followed them, carrying her suit case in her right hand. The step was about two feet from the ground below, which was rough and covered with loose dirt and stones. There was no board, platform, or step, and no person there to aid her in getting off of the car. In accordane with instructions to change cars, she stepped down as carefully as she could. She tried to avoid any accident, but stepped on a loose stone that she did not see; it turned her ankle, and she fell on her knees. The conductor and motorman, who had both left the car before she did, and were talking together at the street curb, came and helped her up. Appellee had frequently ridden on this line of road, but had been away on a short visit, and had never made a transfer on the line before.

The evidence also shows that when the car stopped appellant's ememployees placed a wide board on the step at the rear entrance to the car, which extended thence across the rough portion of the street towards the curb. Upon this fact, the assumptions that appellant had fully discharged its duty to appellee, and that appellee was guilty of contributory negligence, rest. This, however, is not so. The front door being available for exit from the car, the duty of appellant did not end with the placing of the board at the rear. Appellee should have been directed to it. Both assumptions would be valid if appellee had been directed to leave the car by the rear step, where the board was placed, and possibly if she had known it was there to aid the safe egress of the passengers, and took the other way of her own undirected volition. But she did not know of the board. and the evidence, as above set forth, shows an allurement, if not, indeed, a positive direction, for appellee to leave the car at the front entrance. We think the jury was clearly warranted in finding that appellant was guilty of negligence, and that appellee was not.

Brief criticism is made of four instructions tendered by the appellee and given by the court. What has been said in considering the other questions applies to the objections to two of the instructions, and it is

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is clear that the jury was not misled, to the harm of appellant, by the giving of the other two, even if they be justly subject to the complaint made of them.

The judgment of the lower court is affirmed.

Decision No. 1480.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY and the United States Fidelity & Guaranty Company, Plffs. in Err., v. L. V. WALLACE. (No. 108.)

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY and the United States Fidelity & Guaranty Company, Plffs. in Err., v. J. D. CROW. (No. 109.)

32 Sup. Ct. Rep. 205.

COURTS — COMMERCE — FEDERAL POWER — CARRIERS.

The damage caused by the failure of a connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable by the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, c. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, c. 104, U. S. Comp. Stat. 1901, p. 3154), is not traceable to a violation of the statute, redress for which, under § 9 of the original act, can only be had in the Interstate Commerce Commission or in the federal courts.

The jurisdiction of State courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought.

A State court may enforce the liability of an initial carrier of an interstate shipment, arising under the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, by which such carrier is made liable for a loss beyond its own line.

The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one State to a point in another state, of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss, which is made by the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce.

A carrier voluntarily receiving property for transportation to a point on another line in another State is, under the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, conclusively treated as having made a through contract of carriage, rendering it liable for the other carrier's negligent failure to deliver the shipment to the consignee.

Proof of delivery of an interstate shipment to the initial carrier, and of failure to deliver the same to the consignee, raises a presumption of negligence, so as to give rise to the liability imposed by the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, for loss or damage caused by it or any other carrier in the chain of transportation, and casts upon it the burden of proving that the loss resulted from some cause for which such initial carrier was not responsible in law or by contract.

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Submitted December 15, 1911. Decided February 19, 1912.

Two writs of error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review judgments which affirmed judgments of the County Court of Uvalde County, in that State, holding an initial carrier in an interstate shipment liable to the shipper for loss on a connecting line. Affirmed.

See same case below, No. 108, — Tex. Civ. App. —, 117 S. W. 169; No. 109, — Tex. Civ. App. —, 117 S. W. 170.

The facts are stated in the opinion.

Messrs. Maxwell Evarts and James L. Bishop, for plaintiffs in error.

No appearance for defendants in error.

(Nos. 108 and 109.)

Mr. Justice LAMAR delivered the opinion of the court: In both these cases the plaintiff in error was held liable as "initial carrier" for failure to deliver mohair shipped from points in Texas to the consignee in Lowell. The company denied liability on the ground that under the contract expressed in the bills of lading, its obligation and liability ceased when it duly and safely delivered the goods to the next carrier. It excepts to various rulings of the trial court by which it was prevented from proving that it had fully complied with its contract; had duly delivered the mohair, at Galveston, to the first connecting carrier, which delivered it, at New York, to the next carrier, which, in turn, delivered it to the Boston & Maine railroad. Neither the pleadings nor proof showed what this company did with the mohair, nor the cause of its nondelivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification. This contention, however, was found against the carrier, and it was held liable to the plaintiffs. — Tex. Civ. App. —, 117 S. W. 169, 170.

The question as to whether the plaintiff was entitled to recover the value of the goods at Lowell, or, as provided in the bill of lading, at the point of shipment, is suggested in one of the briefs. No such issue was made in the lower court, nor is it referred to in any of the many assignments of error involving the construction and constitutionality of the Carmack amendment to the Hepburn bill of 1906, providing that where goods are received for shipment in interstate commerce, the initial carrier shall be liable for damages caused by itself or connecting carriers, and making void any contract of exemption against such liability. 34 Stat. at L. 584, c. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149.

1. The jurisdiction of the State court was attacked, first, on the ground that section 9 of the original act of 1887 provided that persons damaged by a violation of the statute "might make complaint before the commission . . . or in any District or Circuit Court of the United States." 24 Stat. at L. 379, c. 104, U. S. Comp. Stat. 1901, p. 3154.

It was contended that Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, ruled that this jurisdiction was exclusive, and from that it was

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argued that no suit could be maintained in a State court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way treaceable to a violation of the statute, and is not, therefore, within the provisions of sections 8 and 9 of the act to regulate commerce. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 208, 55 L. Ed. 179, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

The real question, therefore, presented by this assignment of error, is whether a State court may enforce a right of action arising under an act of Congress.

Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of State courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and State government, there is no presumption that Congress intended to prevent State courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. Robb v. Connolly, 111 U. S. 637, 28 L. Ed. 546, 4 Sup. Ct. Rep. 544.

On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a State court as well as in those of the United States. This presumption would be strengthened as to a statute like this, passed not only for the purpose of giving a right, but of affording a convenient remedy.

2. The question as to the constitutionality of the Carmack amendment though ably and elaborately argued, is out of the case, having been decided adversely to the contention of the plaintiff in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164, after the present suit was instituted.

The company, however, seeks to distinguish this from that on the ground that in the Riverside Case it was admitted that the damage to the freight was caused by the negligence of the connecting carrier. And, as the statute applies to cases where the damage is caused by the initial or connecting carrier, and as the cause of the loss of the goods does not appear here, it is argued that liability is to be governed by the contract, which provides that the initial carrier should not be responsible beyond its own line. Plaintiff in error insists that the Carmack amendment did not make it an insurer. Under the construction given that statute in Re Released Rates, 13 Inters. Com. Rep. 550; Bernard v. Adams Exp. Co., 205 Mass. 254, 28 L. R. A. (N. S.) 293, 91 N. E. 325, 18 A. & E. Ann. Cas. 351; Travis v. Wells, F. & Co.,

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79 N. J. L. 83, 74 Atl. 444, it claims that the initial carrier is not deprived of its right to contract with the shipper against liability for damages not caused by either carrier's negligence. But the failure to plead and to prove the cause of the nondelivery of the goods at destination precludes any determination of such questions.

Under the Carmack amendment, as already constructed in the Riverside Mills Case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaintig why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed.

Decision No. 1481.

SWINT v. STATE.

(Appellate Court of Alabama. Jan. 11, 1912.)

57 So. 394.

CHATTEL MORTGAGES.

In a prosecution for disposing of mortgaged property, evidence of accused's possession of the property prior to the time of disposition is admissible.

The progeny of mortgaged animals, born after the making of the mortgage, are subject to its lien; and in a prosecution for disposing of mortgaged animals evidence of the birth of such progeny is admissible.

Under Alabama Code 1907, § 7423, making it an offense for any person to sell any mortgaged personalty, where an indictment charged the disposition of a number of mortgaged animals, proof, showing an unlawful disposition of one of them, was sufficient for conviction, and did not constitute a variance.

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Appeal from City Court of Montgomery; Armstead Brown, Judge.

Lee Swint was convicted of disposing of mortgaged property, and appeals. Modified and affirmed.

L. A. Sanderson, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, J. The defendant having been convicted of disposing of mortgaged property, that part of the judgment sentencing the defendant to hard labor in payment of costs at the rate of 40 cents per day is erroneous, and should be at the rate of 75 cents per diem. Dowling v. City of Troy, 56 South. 118.

The lower court's rulings on the evidence are free from error. The defendant had questioned the witness Gray at length and minutely about the mortgage, and the State had a right to ask when it was delivered to him as part of the transaction inquired about by defendant.

Proof of the defendant's possession of the property prior to the time of the alleged offense was an essential element of the crime charged, and the questions asked eliciting such facts were proper. The cross-examination by the State of defendant's witness shows no abuse of the legitimate latitude permissible on such examinations.

The progeny of mortgaged animals, born after the making of the mortgage, becomes subject to the lien created by the mortgage; and the court properly admitted evidence as to the calves born to the mortgaged cows. Dyer v. State, 88 Ala. 225, 7 South, 267; Meyer Bros. v. Cook, 85 Ala. 417, 5 South. 147; Bush v. Henry, 85 Ala. 605, 5 South. 321; Gans v. Williams, 62 Ala. 41.

The general charge and the special charges requested, in writing, by defendant seem to have been asked on the theory that there was a variance or insufficient proof to support a conviction, in that the indictment alleged the disposition of five cows, one horse, one pony, and two bulls, while the proof showed that several of the animals had died: and that the evidence introduced by the State failed to show that the defendant had disposed of more than one or two of the animals described oin the indictment. The statute under which the indictment is framed (Code 1907, § 7423) makes it an offense for any person to sell or convey any personal property upon which he has given a mortgage; and it is sufficient to authorize a conviction to prove so much of an indictment as shows that the defendant has committed a substantive offense as charged in the indictment. Proof, showing an unlawful disposition of one of the animals by the defendant, would be sufficient to show a commission of the offense charged, and would not constitute a variance. State v. Murphy, 6 Ala. 846; Mooney v. State, 8 Ala. 328; McElhaney v. State, 24 Ala. 71; Porter & Co. v. State, 58 Ala. 66; Bates v. State, 152 Ala. 77, 44 South. 695.

The judgment sentencing the defendant to hard labor at the rate of 40 cents per diem to pay costs of the prosecution will be here corrected, making the rate 75 cents per diem, and the judgment as thus corrected is affirmed.

Corrected and affirmed.

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Decision No. 1482.

BROWN v. WORTHINGTON.

(St. Louis Court of Appeals. Missouri. January 9, 1912. Rehearing Denied January 23, 1912.)

142 S. W. 1082.

PAYMENT — DURESS — CONTRACTS — RATIFICATION — BILLS AND NOTES.

Plaintiff having an option to purchase a lot of hogs from defendant, within a specified time, within the period of the option resold a portion of them, but was then informed by defendant that he could not have the lot without paying a sum in excess of the contract price, and to obtain possession, in order to fulfil his contract with his vendee, plaintiff paid the sum demanded. Held, in an action by plaintiff to recover the excess, a question for the jury whether the conduct of defendant placed a restraint on plaintiff sufficient to overcome the will of a person of ordinary firmness, so as to destroy his free moral agency.

When a payment is made under such pressure or constraint as compels a man to go against his will and virtually takes away his free agency, it amounts to duress, irrespective of any manifestation or apprehension of force.

A contract made under duress is not void, but voidable.

A contract made under duress may be rendered valid by ratification.

Where a note executed in Missouri was payable in Michigan, it was governed by the law of Michigan as to the obligation and duties of the maker.

Plaintiff, having an option to purchase a lot of hogs from defendant, resold a portion of them, after which defendant demanded a sum in excess of the contract price, which plaintiff paid in order to get possession of the hogs for delivery to his vendee; the excess payment being made by means of a check and promissory note. Held, the check and note having been paid, that it was a question for the jury whether plaintiff had ratified the payment of the excess, it appearing that defendant retained a portion of the hogs as security for payment of the note, and that the note had been indorsed without recourse and was governed by the law of Michigan, where presumably possession of a note payable to order and duly indorsed by the payee is prima facie evidence of title in the holder, though defendant testified that he indorsed the note to a bank for collection.

Ratification of a payment made under duress in an action to recover the sum paid is an affirmative defense, and defendant has the burden of proof.

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

Action by Alvah W. Brown against J. A. Worthington. From a judgment for plaintiff, defendant appealed. Under section 3939, Revised Statutes 1909, the case was transferred to the Springfield Court of Appeals for determination, and that court disposed of the case (152 Mo. App. 351, 133 S. W. 93). Subsequently the Supreme Court declared the act authorizing the transfer of cases from one Court of Appeals to another to be unconstitutional, and the proceedings had in the Sprinfield court thereunder to be coram non judice. Appeal argued and submitted to the St. Louis Court of Appeals. Reversed.

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Selden P. Spencer and F. C. Donnell, for appellant.

J. C. Kiskaddon, A. H. Kiskaddon, and Shackelford & Kiskaddon, for respondent.

NORTONI, J. This is a suit for money had and received to plaintiff's use through moral duress imposed upon plaintiff by defendant. Plaintiff recovered, and defendant prosecutes the appeal. Under section 3939, Revised Statutes, 1909, the case was transferred to the Springfield Court of Appeals for determination, and that court disposed of the same, as will appear from its opinion reported under the title of Brown v. Worthington, 152 Mo. App. 351, 133 S. W. 93. Subsequently the Supreme Court declared the legislative act authorizing the transfer of cases from one Court of Appeals to another to be unconstitutional, and the proceedings had in the Springfield court thereunder to be coram non judice. Because of this, the appeal has been argued and submitted here and upon consideration we find ourselves unable to concur in the view of the case expressed in the opinion of the Springfield court.

Plaintiff resides at Grand Rapids, Mich., and is a dealer in hogs. Defendant resides in this State, and is engaged in the same avocation. On July 10, 1906, defendant possessed a large drove of hogs on Chesley Island, in the Mississippi river, near St. Louis, and of these plaintiff desired to purchase a considerable number. On that day defendant submitted to plaintiff a written proposition touching the sale of 1,250 of the hogs on Chesley Island to him, which by its terms accorded plaintiff thirty days for acceptance. The writing is as follows:

"Chesley Park, Mo., 7-10-07.

"I hereby offer for sale to A. W. Brown, of Grand Rapids, Mich., all of my hogs on Chesley Island, with the exception of all spring and summer pigs of this year, and also with the exception of four crippled or barren hogs to be selected by me, the count of hogs sold not to be less than twelve hundred and fifty hogs, for the amount of eighteen thousand five hundred dollars cash, or drafts cashable. I will sell the same lot of hogs to you for twenty-one thousand six hundred dollars on time, provided you pay one-third cash and give bankable approved notes for the balance on six months' time. You may have this option for thirty days. Unless you take the hogs within ten days you must pay me ten dollars per day for each day I keep hogs thereafter, provided you accept of this proposition within thirty days, said charge for keeping to be in proportion with the number you leave here after ten days. You must leave sows now nursing until their pigs are eight weeks old. Sows held back to be shipped in car later. All expense of shipping to be borne by purchaser. I will help load on boat. Notes must be salable. Holding to be subject to unforeseen contingencies.

"J. A. Worthington."

"Received $5.00." (On separate sheet.)

The evidence tends to prove that plaintiff paid defendant five dollars at the time as earnest money, and the correspondence betwen the parties reveals, beyond question, that he accepted, within due time, the proposition pertaining to the sale of 1,250 hogs for $18,500 to be paid in cash or drafts cashable. A few days thereafter plaintiff entered into a written contract with one McPherson, a dealer, of Omaha, Neb., whereby he sold to McPherson 1,000 head of the hogs purchased by him from defendant, which were to be delivered to

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McPherson on July 30, 1906, at Chesley Island. Plaintiff wrote defendant that he would be in St. Louis about July 28th or 29th to settle for the hogs, and, though several letters of defendant to plaintiff concerning the same are in evidence, in none of them does it appear that he objected in any manner to carrying out the contract. Indeed, all of defendant's letters suggest that he expected to deliver the hogs to plaintiff on the terms agreed upon for cash and cashable drafts; that is, $18,500. In accordance with his promise plaintiff came to St. Louis on July 29th, the day before he was to deliver the hogs to McPherson, and tendered to defendant cash and cashable drafts to the amount of $18,500 for the 1,250 hogs. Defendant, then, for the first time, objected and declined to receive this amount in payment. The parties parleyed about the matter for some time during the afternoon of that day, and it appears from plaintiff's evidence that he informed defendant he had sold 1,000 of the hogs to McPherson for delivery on the following day. It is said defendant finally agreed to abide by the contract and accept $18,500 in full payment, but deferred the settlement until the following morning for the purpose of having the bank drafts examined by his banker. On the following morning, July 30th, defendant said he had changed his mind, and would not accept the amount tendered. He insisted on having $22,600 for the hogs, but finally reduced his demand to $20,000. According to the evidence of plaintiff, he was compelled through the urgent necessities of the situation, to pay defendant $20,000 in order to get possession of the hogs, so that he might make delivery of the 1,000 head to McPherson, who came on to receive them that day. There is no conflict in the evidence touching the matter of the amount which plaintiff was required to pay, and did pay defendant, on July 30th for the 1,250 hogs mentioned in the contract. Plaintiff paid to defendant in cash and cashable drafts the sum of $18,500, and gave his personal check for $500 more and a promissory note for $1,000 at six per cent. interest, due in thirty days. The entire payment thus made was $20,000, and this suit is for the amount of $1,500, which plaintiff claims he was coerced into paying, less a little expense for the board and keep of the hogs for certain days which defendant kept them under the contract after ten days from its date.

It is argued plaintiff is not entitled to recover, and the court should have directed a verdict for defendant because the $1,500 must be regarded as having been voluntarily paid to defendant, but we are not so persuaded. The strictness of the common-law rule touching the matter of duress has been much relaxed in the development of the law. Originally "duress" meant only duress of the person, and nothing short of such duress amounting to a reasonable apprehension of imminent danger to life, limb, or liberty was sufficient to enable the party to recover back the money paid. Subsequently, in keeping with the principles of equity and good morals, the doctrine was extended so as to recognize duress of property as a sort of moral duress which might equally with the duress of the person entitle the party to recover back money paid under its influence. While this view prevailed, some of the cases asserted the doctrine that, unless it appeared the money was paid to release the person or property of the payer from detention or to prevent a seizure of either by one having apparent authority in that behalf, a recovery was not to be allowed.

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But, though such were the former rules of decision, the modern authorities go farther, and generally declare that such pressure or constraint as compels a man to go against his will virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another constitutes duress, irrespective of the manifestation or apprehension of force. Under this view, it is said the real and ultimate fact to be determined in every case is whether or not the party paying the money really had a choice; that is, whether he had his freedom of exercising his will. Numerous authorities declare that, if one is compelled by business necessity to surrender to the constraint involved in the unlawful demand and make the payment, moral duress appears. In other words, in such circumstances, it may be found as a fact that the party paying has not had his freedom of exercising his will and paid the money under moral duress, in which event, if it is against equity and good conscience for the money to be withheld from plaintiff, it may be recovered. Such is the undoubted rule of decision in this State as will appear by reference to the following authorities: Niedermeyer v. Curators of State University, 61 Mo. App. 654; Fout v. Giraldin, 64 Mo. App. 165; Wells v. Adams, 88 Mo. App. 215; Am. Brewing Co. v. St. Louis, 187 Mo. 367, 377, 86 S. W. 129; Westlake v. St. Louis, 77 Mo. 47, 46 Am. Rep. 4. See also 30 Cyc. 1303, 1304, 1305.

Here it appears plaintiff was obligated under a written contract to deliver 1,000 head of the hogs on Chesley Island to McPherson, and that McPherson came from Omaha to St. Louis to receive them on the very day the $1,500 was so unlawfully exacted. Plaintiff parleyed with defendant over the matter, and the only alternative to paying the money was to breach his contract with McPherson. Certainly such constitutes, not only a business necessity, but an urgent one, which tends to show that plaintiff did not have the free exercise of his will in the matter. Furthermore, the precepts of equity and good conscience suggest that money so obtained is wrongfully withheld from, and should be returned to, plaintiff. But, though such be true, plaintiff's first instruction is erroneous, in that it omitted to submit the question as to whether or not he had the free exercise of his will or was constrained by the business necessity revealed to pay the money; that is give the check and execute his note to defendant.

This instruction hypothesizes the facts of the case very well, but it seems to assume as a matter of law that, if those facts were found to be true, then moral duress appeared. Such is not true unless the jury believed those facts and circumstances cast a restraint upon plaintiff sufficient to overcome the will of a person of ordinary firmness so as to destroy his free moral agency. See authorities, supra.

There can be no doubt that a contract made under duress is not absolutely void, but voidable only; and, this being true, it is susceptible of ratification so as to render it entirely valid thereafter. Thus, if a person having been constrained by duress to make a contract afterward voluntarily acts upon it or in any way affirms its validity, he thereby precludes himself from afterward avoiding it. 9 Cyc. 443; Ferrari v. Board of Health, 24 Fla. 390, 5 South. 1; Sornborger v. Sanford, 34 Neb. 498, 52 N. W. 368. Because of this, it is said, though plaintiff was constrained to give his check and execute the note under duress practiced upon him by defendant on July 30th, he is not

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entitled to recover for the reason it appears that his personal check was promptly paid by his bank on presentment without a countermand from him and that he paid the note at maturity, thirty days thereafter, without objection, and this, too, when no duress whatever obtained. In other words, it is said, though duress obtained at the time the note and check were given, the transaction was subsequently ratified through payment made at a time when no duress appeared whatever. This matter pertaining to a ratification and as to whether or not duress continues until the payment was made was not submitted to the jury, and we believe it should have been, for the evidence warranted a finding of fact thereon. As we understand the record, the proof is by no means conclusive that plaintiff ratified the transaction by the subsequent payment of the check and note without objection when no restraint touching the exercise of his free will concerning the same appeared. And, unless it be so, we may not declare as a matter of law that a ratification was voluntarily had. It appears by a writing in evidence of date July 30th, made between the parties, contemporaneously with the check and note, that defendant retained possession of one car load of hogs which was not to be shipped to plaintiff until full payment of the note for $1,000 was received by defendant. This being true, the case reveals that, though plaintiff received a sufficient number of hogs on July 30th to satisfy his contract with McPherson, a considerable number thereof was withheld in defendant's possession as a pledge for the payment of his $1,000 note. Until the note was paid, plaintiff was not entitled, under the contract, which appears to have been exacted of him under duress, to possession of the last car load of hogs. Of course, from this the jury might find that duress continued during the interim until the note was paid. As to plaintiff's $500 check, the record reveals no more than that it went forward in due course of business, and was promptly paid by his bank. Such being true, the jury were authorized to find, had the question been submitted to them, that plaintiff was not permitted to exercise his free agency toward countermanding its payment as he was necessarily constrained by the circumstance that defendant still retained possession of a car load of his hogs, though the writing stipulated only that they were held as a pledge to the $1,000 note. At best, had plaintiff countermanded the payment of the check, he could have expected defendant to make him further trouble about getting possession of the remaining car load of hogs, for his course of conduct theretofore suggested that any and every pretext would be seized upon, to the end of defeating the original contract of sale. As before said, touching the payment of the $1,000 note, defendant not only retained possession of one car load of hogs as security therefor so as to compel its payment and continue the duress throughout, but he so negotiated the note as well in a manner as to suggest it was in the hands of an innocent holder.

By its terms the note was made payable at Grand Rapids, Mich. Because of this fact, we are not concerned with the provisions of our negotiable instrument law, for the law of the place of payment or performance, so stipulated in the contract, entered into the undertaking as a controlling factor as to the obligation and duty of the maker. See Daniel, Negotiable Instruments (5th ed.), § 865; Kavanaugh v. Sup. Council Royal League, 138 S. W. 359.

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The law of Michigan touching promissory notes is not in evidence, and it is therefore to be presumed that the identical rule obtains there as obtained here prior to our negotiable instrument statute. Under this rule, possession of a promissory note, payable to order and duly indorsed by the payee, is prima facie evidence of title in the holder, and therefore authorizes the maker to pay it without further inquiry touching the title. Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 39; Dawson v. Wombles, 123 Mo. App. 340, 100 S. W. 547. From indorsements on the note in evidence, it appears that it was negotiated by defendant on the very day he received it.

The indorsement is without recourse and wholly unrestricted as though the complete title thereto were assigned. Nothing on the note whatever suggests that defendant continued to own it at the time it was paid, or that the bank held it for collection. On the contrary, when the note was presented to plaintiff for payment and when paid by him, it suggested on its face and through the indorsements thereon that it had been negotiated before maturity without recourse so as to pass the title into the hands of an innocent purchaser. Plaintiff was, therefore, justified in paying the note without objection when presented, and his act in so doing may not be declared as a matter of law a ratification thereof notwithstanding prior duress. It is true defendant testified that he indorsed the note without recourse and delivered it to his bank for collection, but this does not appear on the note itself, and it does not appear that plaintiff had any notice whatever that defendant retained the title thereto if he did at the time it was paid. At any rate, the mere fact defendant testified that he indorsed the note and placed it in the hands of the bank for collection is no sufficient to conclude that question as one of law, even though it were not expressly denied by proof in the case on the part of plaintiff.

The matter of ratification is an affirmative defense touching which the burden of proof rests with defendant, and the rule is that, though evidence for one holding the burden of proof is uncontradicted, the question of the veracity of the witness and the weight and value of the testimony are nevertheless for the jury, unless a clear admission appears. See Gannon v. Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. It is obvious that we may not declare a ratification conclusively appears here, but the question is one for the jury, which should be inquired into and ascertained upon a retrial.

For the error in plaintiff's instruction above pointed out, the judgment should be reversed and the cause remanded. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur; REYNOLD, P. J., in the result only.

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Decision No. 1483.

A. D. GRANGER CO. v. BROWN-KETCHAM IRON WORKS.

(Court of Appeals of New York. Jan. 23, 1912.)

97 N. E. 523.

CONTRACTS.

Where a contract made written acceptance by the architect a condition precedent to payment, a recovery can be supported only by proof of acceptance.

Where a contract made written acceptance by the architect a condition precedent to recovery, and no waiver was pleaded, an acceptance after suit will not support recovery and is inadmissible in evidence, for until acceptance the purchaser is not in default.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the A. D. Granger Company against the Brown-Ketcham Iron Works. From a judgment of the Appellate Division (138 App. Div. 909, 123 N. Y. Supp. 1104) affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

Norman B. Beecher, for appellant. Willianm J. Martin, for resondent.

WILLARD BARTLETT, J. This suit was brought to recover a balance alleged to be due under a contract in writing whereby the plaintiff corporation agreed to sell and deliver, and the defendant corporation agreed to purchase and receive, certain vault linings to be placed in the Essex county courthouse at Newark, N. J. There is some dispute as to whether the contract was embodied in a single letter or in a series of letters; but, whichever be the fact, it is clear that it contained this provision: "Terms, net cash. Immediate payment after written acceptance by the architect." The architect thus referred to was Mr. Cass Gilbert, who was employed by Essex county to supervise the erection of the courthouse. The complaint made no mention of the provision respecting payment which I have quoted. It alleged that the plaintiff delivered the vault linings therein specified, and that they were accepted by the defendant and were used and incorporated in the work. The answer denied that they were accepted or were used or incorporated in the work, except after being repaired and altered; and there was a counterclaim for the expense of repair and alteration. The plaintiff utterly failed to prove any written acceptance of any of the vault linings by the architect prior to the commencement of the action. Over the objection and exception of the defendant it was allowed to introduce in evidence a certficate by Mr. Cass Gilbert, dated August 16, 1906, 18 months after the suit was brought, stating that the contractors for the construction of the Essex county courthouse were entitled to the forty-fourth payment on their contract. There was nothing on the face of this paper to show that it covered the vault linings which were the subject of the contract between the parties to this action. "As I understand the law," said the learned trial judge in charging the jury, "that certificate, although issued after the action was commenced but also after the work was completed, is competent evidence, and I therefore overruled the objections of the defendant and allowed it in evidence." To this instruction the defendant duly excepted. Although there was no allegation or suggestion of waiver in the

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complaint, the court also left it to the jury to say whether the proof did not establish a waiver of the requirement of the contract that a written acceptance or certificate by the architect should be necessary to entitle the plaintiff to payment. The point that a written acceptance by the architect was a condition precedent to the right to any payment under the contract, and that a waiver of this condition was not provable because it had not been pleaded, was further brought distinctly to the attention of the trial judge by appropriate requests to charge and exceptions to his refusal to charge as requested.

It requires but little discussion to show that this point was well taken and should have been deemed fatal to any recovery by the plaintiff in the present form of the pleadings. The contract prescribed a condition precedent, to wit, a written acceptance of the vault linings by the architect of the Essex county courthouse, to entitle the plaintiff to payment therefor. No such written acceptance had been given up to the time of the commencement of the action. When the suit was begun, therefore, the plaintiff's case was fatally defective in an element essential to make out a cause of action under the contract. The contract did not obligate the defendant to pay until the written acceptance had been obtained; consequently there was no obligation to pay when the action was commenced.

The subsequent acceptance or certificate, issued many months afterward, could not relate back so as to place the defendant in default. It was wholly irrelevant, and the court erred in receiving it and in instructing the jury that they might treat it as timely. In an action at law, the status of the parties is to be considered as it existed when the suit was begun, unless changed conditions have been brought before the court by means of supplemental pleadings, which was not the case here.

In the case of Weeks v. O'Brien, 141 N. Y. 199, 202, 36 N. E. 185, 186, the action was brought upon a building contract, which prescribed that the plaintiff should procure the certificate of the architect that the building had been completed to entitle him to receive the last instalment. "To meet this condition," said the court, "and to show a right of action it should have been averred in the complaint, either generally or specially, that the conditions precedent had been performed, or if the plaintiff relied upon a matter excusing him from procuring the certificate, the facts should have been stated. The complaint neither averred that the certificate had been procured nor that it was unreasonably withheld." So in the present case, the complaint neither alleged that there had been a written acceptance of the vault linings by the architect, nor that the right of the defendant to insist upon such written acceptance had been waived.

The evidence which the trial judge allowed the jury to consider as establishing a waiver, notwithstanding that no waiver had been pleaded, was received over the objection and exception of the defendant; and appropriate exception was also taken to the instructions to the jury on this subject.

The errors which have been pointed out cannot be disregarded as immaterial. It is obvious that they not only affected but controlled the result.

It follows that the judgment must be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment reversed, etc.

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Decision No. 1484.

MAHAR v. HARRINGTON PARK VILLA SITES et al.

(Court of Appeals of New York. Jan. 23, 1912.)

97 N. E. 587.

CORPORATIONS — FOREIGN CORPORATIONS.

General Corporation Law (New York), § 15, provides that no foreign stock corporation, other than a moneyed corporation, shall do business in the State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law, and that no foreign stock corporation doing business in the State shall maintain an action therein upon any contract made in the State, unless before making such contract it had procured such certificate. Held, that a contract executed within the State by a foreign stock corporation which had not complied with the statute was not void, but only unenforceable by it in the courts of the State, as provided by the statute.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry W. Mahar against the Harrington Park Villa Sites, impleaded with another. From an order of the Appellate Division of the Supreme Court in the First Department (146 App. Div. 756, 131 N. Y. Supp. 514), reversing a determination of the Appellate Term of the Supreme Court (71 Misc. Rep. 430, 128 N. Y. Supp. 620), which reversed a judgment of the Municipal Court of the City of New York overruling a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, the Harrington Park Villa Sites appeals. Order reversed.

Alexander Thain, for appellant. Robert Lyon, for respondent.

WILLARD BARTLETT, J. The question certified to this court by the Appellate Division (131 N. Y. Supp. 1127) is as follows: "Does the complaint state facts sufficient to constitute a cause of action against the defendant, Harrington Park Villa Sites?"

The complaint alleges that at the city of New York, about July 27, 1909, the plaintiff had negotiations with the defendants regarding the sale by the defendants and the purchase by the plaintiff of certain lots of land situated at Harrington Park, N. J.; that thereafter the defendants and plaintiff entered into a written agreement for the sale of said property to the plaintiff; that the contract required plaintiff to pay to the Harrington Park Villa Sites, as a part payment thereon, the sum of $500, and plaintiff delivered to said defendant a check on the Carnegie Trust Company, drawn to its order, which check was afterwards duly indorsed by said defendant and paid; that the Harrington Park Villa Sites, at the time named, was a foreign corporation, other than a money corporation, organized and existing under the laws of New Jersey, and had an office for the transaction of its business in the city of New York, and the transaction relating to and the making of the agreement above named took place in the city and State of New York; that at the time of the making of said agreement the Harrington Park Villa Sites had not filed with the secretary of State of New York the statement required by law, and had not paid the tax or obtained a certificate to enable it, as a foreign stock cor-

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poration, other than a money corporation, to do business in the State of New York, and at said times was doing business in violation of section 15 of the general corporation law; and that the plaintiff under said contract deposited with the defendants the said sum of $500, and before the commencement of this action demanded from them the aforesaid sum, no part of which has been paid. Upon these facts the plaintiff demanded judgment against the defendants for the sum of $500 and costs.

The Harrington Park Villa Sites demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on the additional ground that the court had no jurisdiction of the subject-matter, inasmuch as the action was brought to avoid a contract under seal in respect to real estate in New Jersey. The Municipal Court held that the complaint was good; the Appellate Term held that it was bad; the Appellate Division in turn has held that it was good, and the question now comes here.

The theory upon which the complaint has been upheld by the Appellate Division is that the contract therein mentioned was void, because made by a foreign stock corporation, other than a moneyed corporation, doing business in the State of New York in violation of the provision of section 15 of the General Corporation Law (laws of 1909, c. 28 [Consol. Laws 1909, c. 23]); and hence that there was a failure of consideration for the payment of the $500 by the plaintiff, and an action lies to recover back the money. It is assumed in the prevailing opinion that this court held, in the case of Wood & Selick v. Ball, 190 N. Y. 217, 225, 83 N. E. 21, 23, that noncompliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this State absolutely void. Such is not my understanding of the purport of that decision. The only proposition decided in that case was "that compliance with section 15 of the General Corporation Law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this State." It is true that Judge Vann, in the course of the opinion, said that no such corporation could lawfully make contracts in this State without obtaining the required certificate in advance, that he also spoke of contracts made by a corporation which had not obtained the certificate as "unlawful," and said that, in the absence of the certificate, a foreign stock corporation could not carry on business here, "except in violation of law." None of these expressions, however, necessarily imports that a contract thus made is absolutely void. The only penalty which the General Corporation Law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the courts of New York. "No foreign stock corporation doing business in this State shall maintain any action in this State, upon any contract made by it in this State, unless prior to the making of such contract it shall have procured such certificate." Cons. Laws, c. 23, § 15. This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint; but, in my opinion, it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York without the certificate of authority required by section 15 of the General Corporation Law is limited to that thus prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this State without having obtained the certifi-

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cate; but it has not done so. This was the view taken in Alsing Co. v. New England Quartz & Spar Co., 66 App. Div. 473, 73 N. Y. Supp. 347, affirmed 174 N. Y. 536, 66 N. E. 1110, where it was held that section 15 did not prevent a foreign stock corporation doing business here without having procured the necessary certificate from recovering upon a counterclaim growing out of the transaction upon which the plaintiff sued. "The defendant, having been brought into court and thus made to defend," said Mr. Justice O'Brien in that case, "should be allowed, unless there is a distinct provision to the contrary, not only to defend, but also to litigate any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such prohibitive provision in this statute; and therefore the obtaining of the certificate would not be a prerequisite to a recovery upon the counterclaim in question." 66 App. Div. 476, 73 N. Y. Supp. 350.

The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another State is not necessarily void because the corporation had not complied with the laws of such other State imposing conditions upon it as a prerequisite to the lawful transaction of business therein. In Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, a tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from purchasing or holding land in that State until it should acquire the right to do business therein by fulfilling certain prescribed conditions. Here the Missouri corporation had unquestionably violated the laws of Colorado when it purchased the property without having previously designated its place of business and an agent, as required by the Colorado statute. The only penalty which that statute provided, however, for noncompliance with these provisions was that the officers, agents, and stockholders should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held the fair implication to be that, in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute, prescribing the terms upon which foreign corporations might do business in that State; and hence the judiciary ought not to inflict the additional and harsh penalty of forfeiting the estate which had been conveyed to the Missouri corporation. In other words, the court refused to treat the conveyance as void, notwithstanding that it was made to a corporation which was forbidden to receive it.

If I am right in assuming that the only infirmity in the contract mentioned in the complaint is the disability of one of the parties to it, namely, the foreign corporation, to sue upon it in the courts of this State, it remains a valid and effective instrument in all other respects. There is not a word in the complaint to indicate any other defect. Here, then, we have the case of a contract which is not void and upon which the plaintiff has made a payment, which he was expressly required to make by its very terms, and where there is no intimation that the defendant corporation has failed in any respect to comply with the conditions on its part. It is manifest that these facts afford no basis for any legal claim whatever.

The complaint fails to disclose a cause of action, and therefore the order of the Appellate Division should be reversed, and the order of the Appellate Term affirmed, with costs in both courts, and the question certified answered in the negative.

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CULLEN, C. J. I concur in the opinion of WILLARD BARTLETT, J., that the statute imposes only on the foreign corporation, which has not complied with the provisions of the laws of this State requisite to entitle it to do business therein, the penalty of being unable to maintain any action upon a contract made by it, not upon the other party to the contract. In other words, it can be sued upon the contract, but cannot sue thereon. Any other view would lead to astonishing results. Citizens of the State dealing with foreign corporations cannot be expected to know or to ascertain whether those corporations have complied with the laws of the State or not. Hence the contract was enforceable at the option of the plaintiff, and there has been no failure of consideration. But assume that the contract was void, as is the condition, under the statute of frauds, of an oral contract for the sale of land. The vendee cannot enforce it; nevertheless he is not entitled to recover money paid under it, unless the defendant refuses to fulfil. This appears to be settled law, not only in this State, but throughout the whole country. Collier v. Coates, 17 Barb. 471; Dowdle v. Camp, 12 Johns. 451; Abbott v. Draper, 4 Den. 51; Erben v. Lorillard, 19 N. Y. 299, 304; Harris v. Frink, 49 N. Y. 24, 29, 10 Am. Rep. 318; Richards v. Allen, 17 Me. 296; Bennett v. Phelps, 12 Minn. 327 (Gil. 216); Congon v. Perry, 13 Gray (Mass.) 3. The complaint does not allege that the defendant refused to carry out the contract, and until such refusal plaintiff was not entitled to recover back the money paid under the contract, good or bad.

HAIGHT, WERNER, CHASE, and COLLIN, JJ., concur with WILLARD BARLETT, J. CULLEN, C. J., and VANN, J., concur in result.

Order reversed, etc.

Decision No. 1485.

EDGAR G. MONDOU, Plff. in Err., v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. (No. 120.)

NORTHERN PACIFIC RAILWAY CO., Plff. in Err., v. BESSIE BABCOCK, Administratrix. (No. 170.)

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., Plff. in Err., v. MARY AGNES WALSH, Administratrix. (No. 289.) And

MARY AGNES WALSH, Administratrix, Plff. in Err., v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. (No. 290.)

32 Sup. Ct. Rep. 169.

Argued February 20 and 21, 1911. Decided January 15, 1912.

COMMERCE — EMPLOYERS' LIABILITY — CONSTITUTIONAL LAW — DUE PROCESS OF LAW.

Congress, in the exercise of its power over interstate commerce, may regulate the relations of railway carriers and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Federal Constitution, and to the qualification that the particulars in which those relations are regulated

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must have a real or substantial connection with the interstate commerce in which the carriers and employees are engaged.

Congress did not exceed its power to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce by enacting the employers' liability act of April 22, 1908, which abrogates the fellow-servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right in any rule of the common law, and the natural tendency of such changes is to promote the safety of the employees and to advance the commerce in which they are engaged.

The power of Congress, under the commerce clause, to regulate the liability of an interstate railway carrier for the death or injury of an employee engaged in interstate commerce, which may result from the negligence of a fellow servant, is not exceeded by the enactment of the employers' liability act of April 22, 1908, although that act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce.

Congress, possessing the power exercised in the employers' liability act of April 22, 1908, to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce, made no unwarranted interference with the liberty of contract, contrary to U. S. Const. 5th Amend., by declaring in the fifth section of that act that any contract, rule, regulation, or device the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created shall be void.

The imposition of the liability created by the employers' liability act of April 22, 1908, upon interstate carriers by railroad only, and for the benefit of all their employees engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce not within the act are exposed, does not invalidate the statute under the due-process-of-law clause of the 5th Amendment to the Federal Constitution, on the ground that it makes an arbitrary and unreasonable classification, — even assuming that that clause is equivalent to the provision of the 14th Amendment securing the equal protection of the laws.

The laws of the several States, in so far as they cover the same field, were superseded by the enactment by Congress of the employers' liability act of April 22, 1908, regulating the liability of interestate railway carriers for the death or injury of their employees while engaged in interstate commerce.

In error to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New London County in that State sustaining a demurrer to a complaint based upon the Federal Employers' Liability Act. Reversed and remanded for further proceedings. Also —

In error to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of plaintiff in an action based on the Federal Employers' Liability Act. Affirmed. Also —

Cross writs of error to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiff in an action based on the Federal Employers' Liability Act. Affirmed.

Statement by Mr. Justice Van Devanter:

No. 120.

This was an action by a citizen of Connecticut against a railroad corporation of that State, to recover for personal injuries suffered by the plaintiff while in the defendant's service. The injuries occurred in Con-

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necticut August 5, 1908, the action was commenced in one of the Superior Courts of that State in October following, and the right of action was based solely on the Act of Congress of April 22, 1908. [35 Stat. at L. 65 chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171.] According to the complaint, the injuries occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States, and while the plaintiff, as a locomotive fireman, was employed by the defendant in such commerce, and the injuries proximately resulted from negligence of the plaintiff's fellow servants, who also were employed by the defendant in such commerce. A demurrer to the complaint was interposed upon the grounds, first, that the Act of Congress was repugnant in designated aspects to the Constitution of the United States, and, second, that, even if the act were valid, a right of action thereunder could not be enforced in the courts of the State. The demurrer was sustained, judgment was rendered against the plaintiff, the judgment subsequently was affirmed by the Supreme Court of Errors of the State (82 Conn. 373, 73 Atl. 762), upon the authority of Hoxie v. New York, N. H. & H. R. Co., 82 Conn. 352, 73 Atl. 754, 17 A. & E. Ann. Cas. 324, and the plaintiff then sued out the present writ of error.

No. 170.

This was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the exclusive benefit of the surviving widow, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Montana, September 25, 1908, the action was commenced in the Circuit Court of the United States for the District of Minnesota, October 4, 1909, and the right of action was based solely on the Act of Congress before mentioned. It appeared from the complaint that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States, and while the deceased, as a locomotive fireman, was employed by the defendant in such commerce; that the injury proximately resulted from negligence of fellow servants of the deceased, who also were employed by the defendant in such commerce; that the deceased resided in Montana, and died without issue or a surviving father or mother, but leaving a widow and also a sister; and that if the statutes of Montana were applicable, the recovery should be for the equal benefit of the widow and sister, and not for the exclusive benefit of the widow, as prayed in the complaint, and as provided in the Act of Congress. The defendant challenged the validity of the act by a demurrer to the complaint, and in the subsequent proceedings insisted that the recovery, if any, should be for the benefit of the widow and sister jointly, and not for the benefit of the widow alone, but the demurrer and the insistence were overruled, and judgment was rendered for the plaintiff for the exclusive benefit of the widow, as prayed. By a direct writ of error the defendant seeks a reversal of that judgment.

Nos. 289 and 290.

These writs of error relate to the judgment in a single case. It was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the benefit of the surviving widow and children, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred

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in Connecticut, February 11, 1909, the action was commenced in the Circuit Court of the United States for the District of Massachusetts in July following, and the right of action asserted in the second count of the declaration was based on the Act of Congress before mentioned. There were several other counts, but they may be passed without special notice. It was charged in the second count that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States, and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce, and that the injury proximately resulted from negligence of fellow servants of the deceased in pushing other cars against the one on which he was working. A demurrer to that count challenged the validity of the Act of Congress, but the demurrer was overruled. The defendant answered, putting in issue all that was stated in that count, and also alleging that the deceased, by his own negligence, contributed to the injury which resulted in his death, and therefore that the damages should be diminished in proportion to the amount of negligence attributable to him. A trial to the court and jury resulted in a verdict and judgment for the plaintiff upon the second count, and there was a judgment for the defendant upon the other counts. Each party has sued out a direct writ of error from this court. The defendant calls in question the ruling upon its demurrer and other rulings in the progress of the cause, notably such as related to the nature of the employment in which the deceased and the fellow servants whose conduct was in question were engaged at the time of the injury, and to the admeasurement of the damages. The plaintiff makes no complaint of the judgment upon the second count, and, if it shall be affirmed, wishes to waive her objections to the judgment upon the other counts.

The act whose validity is drawn in question (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), and the amendment of April 5, 1910 (36 Stat. at L. 291, chap. 143), are as follows:

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several States or territories, or between any of the States and territories, or between the District of Columbia and any of the States or territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the

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United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employees," approved June eleventh, nineteen hundred and six. [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148].

Approved April 22, 1908.

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An Act to Amend an Act Entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," Approved April Twenty-second, Nineteen Hundrtd and Eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. That said act be further amended by adding the following section as section nine of said act:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury."

Approved, April 5, 1910.

Mr. Donald G. Perkins for Mondou.

Mr. Samuel A. Anderson for Babcock, Administratrix.

Messrs. Endicott P. Saltonstall and George D. Burrage for Walsh, Administratrix.

Mr. Charles W. Bunn for the Northern P. R. Co.

Messrs. John L. Hall, Edward D. Robbins, and Joseph F. Berry, for the New York, N. H. & H. R. Co.

The late Solicitor General Bowers, Attorney-General Wickersham, and Special Assistant to the Attorney-General, J. C. McReynolds, for the United States as amicus curiæ.

Mr. Justice VAN DEVANTER, after stating the cases as above, delivered the opinion of the court:

The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do those regulations supersede the laws of the States in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (art. I., § 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce . . . among the several States," and "to make all laws which shall be necessary and

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proper" for the purpose, have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, — the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. "To regulate," in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. Cooley v. Port Wardens, 12 How. 299, 315-317, 13 L. ed. 996, 1003, 1004; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 577, 22 L. ed. 654, 662; Sherlock v. Alling, 93 U. S. 99, 103-105, 23 L. ed. 819-821; Smith v. Alabama, 124 U. S. 465, 479, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 99 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Peirce v. Van Dusen, 69 L. R. A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, 698-700; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. ed. 772, 776, 13 Sup. Ct. Rep. 914; Patterson v. The Eudora, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; Johnson v. Southern P. Co., 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Employers' Liability Cases (Howard v. Illinois C. R. Co.), 207 U. S. 463, 495, 52 L. ed. 297, 308, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 161, 176-178, 52 L. ed. 436, 443, 444, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, ante, 2, 32 Sup. Ct. Rep. 2.

As is well said in the brief prepared by the late Solicitor-General: "Interstate commerce — if not always, at any rate when the commerce

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is transportation — is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged; and (3) because the act offends against the 5th Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract, and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class, and all their employees engaged in such commerce in a favored class.

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation

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of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of ont person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 577, 22 L. ed. 654, 662; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 417, 54 L. ed. 1088, 31 Sup. Ct. Rep. 59.

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. Lottery Case (Champion v. Ames), 188 U. S. 321, 353, 355, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 A. & E. Ann. Cas. 561; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 203, 55 L. ed. 167, 181, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 581, 582, 22 L. ed. 654, 664; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this

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is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in Southern R. Co. v. United States, 222 U. S. 20, 27, ante, 2, 32 Sup. Ct. Rep. 2, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in Employers' Liability Cases (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein.

Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from liability which the act creates, is repugnant to the 5th Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164, and Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it.

Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the "due process of law" clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the 14th Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136.

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It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579:

(P. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this,— that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this Constitution, and the laws of the United States which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, from the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'

(P. 426) "This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them."

And particularly opposite is the repetition of that principle in Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present act, the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Smith v. Alabama, 124 U. S. 465, 473, 480, 482, 31 L. ed. 508, 510, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Reid v. Colorado, 187 U. S. 137, 146, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. The inaction of Congress, however, in no wise affected its power over the subject. The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 581, 22 L. ed. 654, 664;

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Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; Southern R. Co. v. Reid, No. 487, 222 U. S. —, ante, 140, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, No. 136, 222 U. S. —, ante, 160, 32 Sup. Ct. Rep. 160.

We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. That, however, was not because the ordinary jurisdiction of the Superior Courts, as defined by the Constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the federal courts, and (2) that, if this be not so, the superior courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employees for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congeressional act, and in others the different standards recognized by the laws of the State.

We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States." 25 Stat. at. L. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508; Robb v. Connolly, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544; United States v. Barnes, 222 U. S. —, ante, 117, 32 Sup. Ct. Rep. 117. This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that "the jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act, and brought in any State court of competent jurisdiction, shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the State courts, presupposes that they already possessed it.

Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to en-

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large or regulate the jurisdiction of State courts, or to control or effect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say "when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion," because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant.

The suggestion that the Act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. As was said by this court in Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. ed. 833, 838, 839:

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and within its jurisdiction, paramount, sovereignty. . . . If an Act of Gongress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some Act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman v. Booth, 21 How. 506, 16 L. ed. 169; and hence the State courts have no power to revise the action of the federal courts, nor the federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or con-

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fusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

In No. 289 several rulings in the progress of the cause, not covered by what already has been said, are called in question, but it suffices to say of them that they have been carefully considered, and that we find no reversible error in them.

In Nos. 170, 289, and 290 the judgments are affirmed, and in No 120 the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion

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Decision No. 1486.

A. H. GRIGSBY, Petitioner, v. R. L. RUSSELL and LILLIE BURCHARD, Administrators of JOHN C. BURCHARD, Deceased.

[No. 53.]

INSURANCE — WAIVER.

A condition in a policy of life insurance that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company, and a breach of the condition may be waived.

The holder of a valid policy of insurance upon his own life may, as a matter of financial necessity, make a valid assignment of the policy to a person having no insurable interest in the life of the insured in consideration of a small sum of money and an undertaking to pay the premiums due and to become due, and the assignee takes the entire interest in the policy, as against the personal representatives of the insured.

A clause in a policy of life insurance that any claim against the company arising under any assignment of the policy shall be subject to proof of interest does not diminish the rights of an assignee with no insurable interest, as against the personal representatives of the insured, if there is no rule of law to that effect, and the company sees fit to pay.

32 Sup. Ct. Rep. 58.

Argued November 10 and 13, 1911. Decided December 4, 1911.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, reversing a judgment of the Circuit Court for the Middle District of Tennessee, held an assign-

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ment of a policy of life insurance to an assignee with no insurable interest valid only to the extent of the money actually given for it and the premiums subsequently paid. Reversed.

See same case below, — L. R. A. (N. S.) —, 94 C. C. A. 61, 168 Fed. 577.

The facts are stated in the opinion.

Messrs. Montague S. Ross, John A. Pitts, and K. T. McConnico for petitioner.

Mr. George T. Hughes for respondents.

Mr. Justice HOLMES delivered the opinion of the court:

This bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of $100 and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The Circuit Court of Appeals, in deference to some intimations of this court, held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. — L. R. A. (N. S.) —, 94 C. C. A. 61, 168 Fed. 577.

Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (James Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third premium ad diem, and that when Grigsby paid, he was making a new contract. But a condition in a policy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company. Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Oakes v. Manufacturers' F. & M. Ins. Co., 135 Mass. 248. The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least, in its most con-

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vincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's Case. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. Stat. 14 George III,, chap. 48.

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the Bankruptcy Law, § 70[1], which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only (Godsall v. Boldero, 9 East, 72), long has disappeared (Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501). And cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith.

Coming to the authorities in this court, it is true that there are intimations in favor of the result come to by the Circuit Court of Appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. On the other hand, it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 547, 24 L. ed. 251. And expressions more or less in favor of the doctrine that we adopt are to be found also in Ætna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877. It is enough to say that while the court below might hesitate to decide against the language of Warnock v. Davis, there has been no decision that precludes us from exercising our own judgment upon this much debated point. It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the Supreme Court of that State came to the conclusion that we adopt, in an unreported case,— Lewis v. Edwards, December 14, 1903. The law in England and the preponderance of decisions in our State courts are on the same side,

Some reference was made to a clause in the policy that "any claim against the company, arising under any assignment of the policy, shall be subject to proof of interest." But it rightly was assumed below that if

[1] U. S. Comp. St. 1901, p. 3451.

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there was no rule of law to that effect, and the company saw fit to pay, the clause did not diminish the rights of Grigsby, as against the administrators of Burchard's estate.

Decree reversed.

Mr. Justice LURTON took no part in the decision of this case.

Decision No. 1487.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Petitioner, v. J. WILLIAM McCUE, SAMUEL O. McCUE, HARRY M. McCUE, and RUBY G. McCUE, Infants, by Marshall Dinwiddie, Their Next Friend, et al.

32 Sup. Ct. Rep. 220.

INSURANCE — PLACE OF CONTRACT.

Death by a legal execution for crime is not covered by a policy of life insurance, though the policy contains no provision excepting such manner of death from the risks covered by it.

A policy of life insurance, though executed at the company's office in Wisconsin, is a Virginia contract, where the application was made by a resident of the latter State at a place in that State, and the policy was delivered to him there, when he gave his note for the premium, which was payable at that place, and subsequently paid there, the policy providing that it should not take effect until the first premium should be actually paid.

Provisions in the charter of a foreign life insurance company making a person who insures therein a member of the company, and fixing his interest at the amount of his insurance, give no right of recovery for death by legal execution for crime, where, under the laws of the place of contract, the policy, by which alone the rights of the insured and the beneficiaries must be measured, does not cover a death so caused.

[No. 138.]

Argued December 20 and 21, 1911. Decided February 19, 1912.

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which, reversing a decree of the Circuit Court for the Western District of Virginia, upheld the right to recover upon a policy of life insurance for a death caused by legal execution for crime. Judgment of Circuit Court of Appeals reversed, and that of the Circuit Court affirmed.

See same case below, 93 C. C. A. 71, 167 Fed. 435.

The facts are stated in the opinion.

Messrs. William H. White, William H. White, Jr., George H. Noyes, and John R. Dyer for petitioner.

Messrs. Daniel Harmon, G. B. Sinclair, and H. W. Walsh for respondents.

Mr. Justice McKENNA delivered the opinion of the court:

The question in the case is whether death by the hand of the law in execution of a conviction and sentence for murder is covered by a policy of life insurance, though such manner of death is not excepted from the policy, there being no question of the justness of the sentence.

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The case was in equity, and brought in the Corporation Court for the city of Charlottesville, State of Virginia, by respondents, children and sole heirs of James S. McCue, by Marshall Dinwiddie, their next friend, upon a policy of life insurance issued to McCue by petitioner, named herein as the insurance company.

The main defense of the insurance company was (there were some technical defenses with which we are not concerned) that McCue came to his death by hanging after conviction and sentenced for the murder of his wife.

The suit was brought under the laws of the Commonwealth of Virginia against the insurance company, the People's National Bank of Charlottesville, as garnishee, and the executors of McCue's estate.

The case was removed on the petition of the insurance company, on the ground of a separable controversy, to the Circuit Court of the United States for the Western District of Virginia. In that court there was a demurrer filed to the bill which raised the question as to the proper arrangement of the parties, and whether the heirs or the executors were the parties to recover on the policy, assuming that the insurance company was liable. In the answer the same questions were again raised and all liability of the insurance company denied, principally on the ground of the manner by which McCue came to his death.

At the trial the technical defenses were waived, and by agreement of the parties the heirs of McCue and his executors were treated as parties plaintiff. The court, considering the cause as one of law, and a jury having been waived by the parties, adjudged on the pleadings and an agreed statement of facts, "that the plaintiffs take nothing by their bill, and that said defendant go without day," with costs, the latter to be paid by a deposit made in the registry of the court in refund of the premium paid by McCue, as far as it would go. The judgment was reversed by the Court of Appeals and a new trial ordered. This certiorari was then petitioned for and allowed.

The facts as agreed are these: The insurance company is a corporation duly organized under the laws of Wisconsin, and a citizen and resident thereof. It is a mutual insurance company, with the power and obligations given to and imposed upon it by certain acts of the legislature of Wisconsin, which acts constitute its charter.

The People's National Bank of Charlottesville was made a party solely as garnishee, it having certain sums of money belonging to the insurance company in its possession.

McCue made written application to the insurance company in his own handwriting for the policy in suit, in pursuance of which policy was issued for the sum of $15,000 on his life. He paid premiums as follows: When the policy was delivered to him he gave his note for the sum of $427.50 for the premium to E. L. Carroll and L. Fitzgerald, payable to their order, six months after date, at the Jefferson National Bank, Charlottesville, Virginia, Carroll & Fitzgerald at the time were soliciting insurance for T. A. Cary, the general agent of the insurance company in Virginia. The note was indorsed by Carroll & Fitzgerald to Cary, with the following memorandum attached: "$427.50. Hold this note in Mr. Cary's office (don't use bank.) Notify Mr. McC. about thirty days before due, and send it to E. L. Carroll for collection." Carroll & Fitzgerald gave their individual notes to Mr. Cary, amounting to $427.50, on which he advanced the money to the company and held the notes for collection, with McCue's note as collateral.

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The company received, at his home office in Milwaukee, the amount of the premium in cash from Cary on May 2, 1904, but had no knowledge of the note arrangement between McCue, Carroll & Fitzgerald, and Cary. The note was paid by McCue by checks after he had been arrested, he protesting his innocence, "which facts were known to Cary." The note arrangement was a general custom among soliciting agents for the company. Other facts will be noted hereafter.

The main question in the case is, as we said, the liability of the company under the circumstances. Or, to put it more abstractly for the present purpose of our discussion, whether a policy of life insurance insures against death by a legal execution for crime.

The question was before this court in Burt v. Union Cent. L. Ins. Co. 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139. In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: "Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?" And answering, after discussion, we said: "It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation, it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for." Cases were cited, among others Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300. There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying that "a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment."

These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration, much less be held to transcend by omissions or implications, and we pass by, therefore, the very interesting argument of counsel for respondents as to the indefinite and variable notions which may be entertained of such policy according to times and places and the temperaments of courts, and the danger of permitting its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts deliberately made. We come, therefore, immediately to the special contention of respondents, that the contract in controversy is a Wisconsin contract, and is not offensive to the public policy of that State or to its laws, but was indeed, as it is contended, made in conformity to the laws of that State, and carries all of their obligations.

The obligation of a contract undoubtedly depends upon the law under which it is made. In which State, then, Virginia or Wisconsin, was the policy made? In Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus), 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822,

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the question arose whether the contract of insurance sued on was made in New York or Missouri. The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the office of the company, provided that the contract between the parties was completely set forth in the policy and the application therefor, taken together. The application declared that the contract should not take effect until the first premium should have been actually paid during the life of the person proposed for assurance. Two annual premiums were paid in Missouri, and the policy, at the request of the assured, was transmitted to him in Missouri, and there delivered to him. The court said: "Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract, and governed by the laws of Missouri."

In Mutual L. Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106, the insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in Montana. It was held that "under these circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that State." Citing Equitable Life Assur. Soc. v. Clements, supra.

The same conditions existed in Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538, and it was decided, the two cases above mentioned being cited, that the policy of insurance involved was a Washington contract, not a New York contract.

In the case at bar the application was made by McCue at Charlottesville, Virginia, February 25, 1904, and the policy was delivered to him there on March 15, 1904, when he gave his note for the premium which was payable at that place and subsequently paid there. And it is provided in the policy that it should not take effect until the first premium should be actually paid. Following that provision is this: "In witness whereof the Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract, this 15th day of March, 1904." But manifestly this was not intended to affect the preceding provision, fixing the time when the policy should go into effect, nor the legal consequences which followed from it. In Equitable Life Assur. Soc. v. Clements the policy was executed at the company's office in New York. The exact conditions, therefore, existed which made, in the cases cited, the policies involved therein not New York contracts, but, respectively, Missouri, Montana, and Washington contracts. The policy, therefore, in the case at bar, must be held to be a Virginia, and not a Wisconsin, contract.

Respondents, however, contend that "the right asserted is a property right, vested by the special statute of incorporation, which is not devested by crime;" and that "the charter controls the rights of members irrespective of the place where such rights may have been acquired." To support the contention that the right asserted is a property right, respondents adduce §§ 1, 4, 7, and 20 of the charter. Their argument is brief and direct, and we may quote it. It is as follows: "Under the charter of the company, McCue occupied the relation of a member of the company. This was a valuable property right. Upon his death this member-

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ship passed to his executors." And further: "The charter of the company, § 1, provided that certain persons named 'and all other persons who may hereafter associate with them in the manner hereinafter prescribed, shall be, and are, declared a body politic and corporate. Section 4 prescribes that persons who shall hereafter insure with the company 'shall thereby become members thereof.' And § 7 prescribes the manner in which this membership is to be perfected. 'Every person who shall become a member of this association, by effecting insurance therein, shall, the first time he effects insurance, pay the rates fixed by the trustees,' etc. There can be no doubt, then, that McCue was a member of this corporation. He insured with the company, and thereby he became a member. His interest in the company was fixed by the amount of his insurance. This membership constituted a vested property right. He was eligible as an officer, and entitled to vote in the management of the company (§ 20); entitled to the dividends on the surplus and profits (§§ 2, 13); and was a joint owner of the assets of the company." But this is assuming what is to be proved. It may be true that a person who insures with the company becomes a member thereof, and that his interest is fixed at the amount of his insurance. But what constitutes his title or right? Necessarily his policy. What entitles him to a realization of the benefits of his membership? Necessarily, again, his policy, if the manner of his death be not a violation of it. We need not follow counsel, therefore, through their argument as to the rights of property and the rules of its devolution, which, it is contended, must obtain, whatever be the act or guilt of the person producing it. The question before us, and the only question, is: What rights did McCue's estate and children get by his policy? And we are brought back to the simple dispute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the Federal Courts of Virginia, in which State the contract was made. And it is consonant with the ruling in the State courts. In Plunkett v. Supreme Conclave, I. O. H., 105 Va. 643, 55 S. E. 9, a certificate of membership in the Conclave, which was issued to one Charles W. Plunkett, his wife being beneficiary, was considered. One of the conditions was that Plunkett comply with the laws, rules, and regulations then governing the Conclave, or that might in the future be enacted. There was no provision against suicide in the laws, rules, or regulations when the certificate was issued. Such a provision was subsequently enacted. Plunkett committed suicide, and the Order refused to pay benefits. Plunkett's wife brought suit to recover them, and asserted a vested interest in the benefits under the certificate. The contention was rejected. The trial court held that the forfeiture of the rights under the certificate, if the insured while sane committed suicide, was valid, because (1) it involved no vested right of the insured, and (2) because it was a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death. And the court added: "Inasmuch as the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the new by-law is valid, because there can be no such thing as a vested right for a sane man to commit suicide, and for the further reason that it is nothing more than the written expression of the provision which the law had read into the contract at its inception."

The Supreme Court of Appeals affirmed the judgment, quoting the reasoning of the trial court, and added to it the considerations of public

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policy expressed in the Burt Case and Ritter Case, supra, and other cases. If the public policy of Virginia were the same as, it is contended, that of Wisconsin is, whether this court should have to yield it, we are not called upon to decide.

Being of opinion that McCue's policy was a Virginia contract, it may be unnecessary to review the cases relied on by the respondents, which they contend declare the public policy of the State of Wisconsin. It may, however, be said that the cases are not absolutely definite.

Two cases only are cited, McCoy v. Northwestern Mut. Relief Assoc. 92 Wis. 577, 47 L. R. A. 681, 66 N. W. 697, and Patterson v. Natural Premium Mut. L. Ins. Co., 100 Wis. 118, 42 L. R. A. 253, 69 Am. St. Rep. 899, 75 N. W. 980. We will not consider the facts in the first case. It is enough to say that the court, following a ruling that it had pronounced in other cases, said: "If a contract for life insurance does not provide against death by suicide or self-destruction, then such cause of death does not constitute a defense," citing four cases. The second also presented one of suicide, the insured being sane. It was contended that the policy did not cover such a risk, because (1) an incontestable clause (there being one) in the contract did not cover such a death; (2) if it could be held so in terms, it would be void, as against public policy; (3) suicide was a crime, and hence within a stipulation against death in violation of law.

The reliance of the insurance company to support its contentions was upon the Ritter Case, supra. The court, however, reiterated its former ruling as to death by suicide, though it recognized the cogency of the reasoning of the Ritter Case, that the insured should do nothing to accelerate the contingency of the policy, saying (page 122): "Were the question a new one in the law, the argument would be well-nigh irresistible; especially where, as in the Ritter Case, the policy runs in favor of the estate of the insured, and the proceeds will go to the enrichment of such estate, instead of to other beneficiaries."

There were other beneficiaries in the case, the policy having been assigned, with the consent of the company, to the children of the insured. Commenting further on that fact, the court said it brought the case within the principle of certain cases, which were cited, but added, "nor would the application of that principle to this case necessarily conflict with the Ritter Case, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in the case of a policy in favor of beneficiaries who had a subsisting vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured." McCue's policy was in favor of his estate, and comes within the concession made by the Supreme Court to the reasoning of the Ritter Case.

The court did not discuss considerations of public policy, but we may assume it found nothing offensive to such policy in a contract of insurance which covered death by suicide, and it may be supposed that the court would find nothing repugnant to public policy in a contract which did not except death for crime. However, we need not speculate, as the Wisconsin law does not control the policy in suit.

One other contention of respondents remains to be noticed. It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat

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what we have said above,— the policy is the measure of the rights of everybody under it, and as it does not cover death by the law, there cannot be recovery either by McCue's estate or by his children.

Judgment of the Court of Appeals is reversed, and that of the Circuit Court is affirmed.

Decision No. 1488.

MEARS MINING CO. v. MARYLAND CASUALTY CO.

(Springfield Court of Appeals. Missouri. March 4, 1912.)

144 S. W. 883.

INSURANCE — EQUITY — FORFEITURE — STATUTES — CONSTRUCTION — LEGISLATIVE INTERPRETATION.

Assent to the retention and deposit in bank by a purchaser of property of an employer of part of the price to await the outcome of an appeal by the employer from a judgment for damages for the death of an employee, in which a sufficient appeal bond had been filed, did not violate a policy of employer's liability insurance, which provided that "the assured shall at all times render to the company all co-operation and assistance in his power," in that it made the claim less easy to settle by inspiring confidence in the claimant of ultimate collection of the claim.

Forfeitures are not favored, and courts will not place a technical construction upon language for the purpose of creating a forfeiture.

An offer by an indemnity company to pay an employer a pro rata share of an amount paid by the employer to discharge a judgment for an injury to a servant, with a refusal by the employer to accept anything less than the full obligation of the indemnity company, does not constitute an agreement to release the company from liability to the limit specified in its policy, and to permit the prorating of the amount paid.

Where a contract of indemnity insurance provided that the insurer would indemnify the insured against loss from any liability that might be imposed by law not exceeding $5,000 on account of the death or bodily injuries of an employee, a further stipulation that the insured should not settle any claim without the consent of the insurer, contemplated only the settlement of claims before trial, and will not entitle the insurer to a proportional benefit of a compromise made in good faith after judgment and affirmance, which did not reduce the amount of judgment below the sum which the insurer was obligated to pay.

A contract of indemnity insurance is to be construed the same as other insurance contracts; i. e., most favorable to the insured.

Where a statute in naming a class of objects uses general words which will cover all kinds of such objects, the words used will be given a general construction in the absence of express words in the statute itself limiting their meaning.

While, where a statute enumerates particular classes of persons or things followed by general words, such words will ordinarily be limited to mean objects of the kind and character specified, the rule is resorted to merely as an aid to the ascertainment of the legislative intent, and, where from the entire statute and the purpose for which it was enacted, it is apparent that the general words were intended to include classes not specially designated, they must be given an extended meaning.

And, where the particular words exhaust the class, the general words must be given a meaning beyond the class, or be discarded altogether.

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Rev. St. (Mo.) 1909, § 7068, which provides that in any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine "or other insurance," the court may allow damages and attorney fees where it appears that such company has vexatiously refused to settle, is highly penal, and should not be held to apply to any company or class of insurance which is not plainly included therein.

In construing Rev. St. (Mo.) 1909, § 7068, which provides for the assessment of a penalty for a vexatious refusal to pay a loss under a policy of fire, life, marine, "or other insurance," and which was originally enacted in 1865, the fact that indemnity insurance was not in existence at the time of the enactment of the statute may be considered in determining whether or not the general words include that class of insurance, but is not conclusive.

And the fact that the statute was amended in 1911 to include indemnity insurance is strong evidence that in the opinion of the legislature such insurance was not included in the original statute.

Rev. St. (Mo.) 1909, § 7068, which provides that in an action to recover the amount of any loss under a policy of fire, life, marine "or other insurance," damages may be assessed for a vexatious refusal to pay, will not apply to an action on a policy of indemnity insurance, as such insurance is not of the same class as ordinary fire, life, and marine insurance.

Appeal from Circuit Court, Newton County; Carr McNatt, Judge.

Action by the Mears Mining Company against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed conditionally on remission of part of the recovery.

O. L. Cravens, for appellant. George Hubbert, for respondent.

GRAY, J. This action is predicated upon an employer's liability policy, issued by the appellant to resondent July 2, 1907, by the terms of which the former agreed for a valuable consideration or indemnify the respondent for a period of twelve months against loss from liability that might be imposed by law upon respondent not exceeding $5,000 on account of death or bodily injuries suffered by any one employed by the respondent. At the time the policy was issued, the respondent was engaged in mining in Newton county, and on the 30th day of July of that year one Frank Overby, an employee of respondent, was killed in its mines. Mr. Overby's widow instituted suit against the respondent to recover damages for her husband's death, and secured a judgment for $6,000. The appellant took charge of that suit under the terms of the policy, and caused the same to be appealed, and the judgment was affirmed by this court on the 2d day of May, 1910 (144 Mo. App. 363, 128 S. W. 813). After the affirmance, the respondent negotiated a settlement with the widow, by the terms of which the judgment, which at said time amounted, with interest and costs, to a little over $7,000, was settled for the sum of $5,203.35, which was the full amount the appellant was liable for under the terms of its policy, and which amount was paid to the widow and the judgment satisfied by her assignee. This suit is instituted to recover the amount so paid, together with the sum of $1,100, which plaintiff claimed it was entitled to recover as damages and attorney's fees on account of defendant's vexatious refusal to pay the said $5,203.35. The cause was tried before the court without a jury, resulting in a judgment in favor of the respondent for the amount claimed under the terms of the policy, and $1 damages, and $250 attorney's fee. From this judgment, the appellant appealed to this court.

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The appellant's first contention is that plaintiff is not entitled to recover because it violated certain conditions of the policy. The part of the policy it is claimed the plaintiff violated reads as follows: "The assured shall at all times render to the company all co-operation and assistance in his power. The assured shall not voluntarily assume any liability, nor shall the assured, without the written consent of the company previously given, incur any expense or settle any claim, nor interfere in any legal proceeding." While that suit was pending in this court, negotiations were entered into for the sale of the mining company's property in Newton county, but it was discovered that the judgment obtained by Mrs. Overby was a lien on the real estate of the company, and notwithstanding an appeal bond had been given, the purchaser, on account of this lien, refused to pay the purchase money to the company. In addition to the judgment lien, there was a prior mortgage lien, securing an indebtedness of $6,500. The property was sold for $10,000, and the sale was consummated by the company agreeing that the $3,500, the amount of the purchase price in excess of the mortgage debt, should be deposited in a bank in Neosho to be paid to Mrs. Overby in case her judgment was affirmed. It is claimed this action on the part of the mining company was in violation of the terms of the policy above set forth, and released the appellant herein. This contention is based on the theory that, when the $3,500 was put in the bank, it caused the plaintiff in the damage suit to feel secure as to that amount of her judgment, and therefore rendered it more difficult to compromise with her than it otherwise would have been. There is no evidence that the appeal bond was not good for the amount of the judgment, or that the fact that the money was put in the bank in any wise rendered a settlement with Mrs. Overby more difficult. The purchaser was willing to take the property subject to the lien, if the amount of the equity over and above the mortgage, and to which the widow could look for the collection of her judgment, was deposited in the bank, and not paid to the mining company.

Forfeitures are not favored, and the courts will not put upon language any technical construction for the purpose of creating a forfeiture. The appellant's attorney says: "We submit that while the appeal was pending, and in view of the belief that must have existed in the mind of Overby and her attorney that plaintiff was insolvent, and the collection of her judgment was in jeopardy, defendant, under the terms of the policy, was entitled to the full use and benefit of that circumstance. Defendant had the sole right by the policy, at least at that time, to deal with that suit, and to control plaintiff therein. If Overby and her attorney believed the appeal bond was invalid, and plaintiff knew of that circumstance, it needs no argument to prove that plaintiff was not rendering defendant 'all co-operation and assistance in its power' when by its independent conduct it secretly made a contract with Overby whereby it deposited $3,500 for her benefit in case of an affirmance. Was it not within the power of plaintiff to co-operate and assist defendant by allowing Overby to remain in the belief of the notorious fact that plaintiff was insolvent, and the appeal bond was such that recovery thereon was doubtful?" If insolvency is a legal defense to a debt, this argument is sound. But the question of solvency or insolvency has nothing to do with the duty to pay, only the ability. We do not think it was was the duty of the mining company to boast of an insufficient appeal bond, or of its own insolvency for the purpose of inducing Mrs. Overby to accept less than the full amount of her debt. On the other hand, it was the duty of this plaintiff to pay

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the judgment when it was affirmed, and this duty existed, whether it was solvent or not. The appellant in this case had charge of the damage suit in the Appellate Court, and had the benefit of a stay of execution by reason of the appeal bond, and had no legal right to demand that the respondent miss a good opportunity to sell its property because in case of a sale the respondent would thereby get money and show its ability to pay its legal demand, and thus make it more difficult to get Mrs. Overby to accept less than her just debt.

Not only does the appellant insist that respondent forfeited all rights to its indemnity because it placed its assets where they would be available to meet the demands of its creditors when their validity had been established, but it had the audacity to write the respondent, after the judgment had been affirmed, that it was disappointed because respondent was not insolvent. This indefensible and contemptible sentiment is found in a letter written by appellant's claim agent to the respondent, and in which he said: "We . . . hoped when this bonding (appeal) question first came up that there would be some means, by which on account of the condition of the assured company, it would be unnecessary for any one to pay out any money in connection with this accident." Thus we find the appellant boldly writing to the respondent that it hoped that the latter's mining adventure had been so unfortunate that its capital was lost, and it would be unable to pay its debts including the claim of the widow for the wrongful killing of her husband, and whose claim had been approved by a judgment of a court of last resort. And all of this in order that this appellant might thereby be relieved from the performance of its contract it had voluntarily entered into and for a consideration of its own naming. The judgment, interest, and costs amounted to about $7,000, and, as it was settled by plaintiff for $5,203.35, the appellant claims it is entitled to the benefits of the compromise on the basis or ratio that its liability of $5,000 bore to the total liability. The clause of the policy relating to this feature reads: "No action shall lie against the company to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue."

The appellant's claim is based, first, on the theory that there was an agreement between the parties by which the plaintiff was to settle the loss if compromise could be made on the ratio above stated. On June 16, 1910, and after the judgment had been affirmed, Mr. Johnson, president of the plaintiff corporation, wrote to the defendant that he had had an intimation from the attorney of Mrs. Overby that the matter might be compromised for something less than the judgment, and suggested that the manager of the mines at the time Overby was killed might be able to settle the claim; this part of the letter reading: "Therefore, if you want to employ him along with ourselves — (as we, of course, will have to pay anything demanded after your obligation is exhausted) — we will join you — he will go under directions of our attorney." In reply to this letter the appellant sent the following dispatch on the 17th: "Your letter 16th received; we will pay five-sevenths of any amount in settlement up to $5,000, and $100 towards expenses of adjustment." On receipt of this telegram, the respondent wired: "Your telegram received; I can't understand your position; are you trying to shirk your $5,000 limit per contract?" The appellant replied: "For example of what we mean, suppose a compromise adjustment should be arranged for $5,000 we to pay five-sevenths of this amount, and you pay two-sevenths, our expenditure

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would, of course, not be as great as the limit of our policy. On the other hand, neither would yours be as much as if you had to pay all over and above the limit of our policy upon the present condition of affairs, and for any settlement under $5,000 the expenditure would be graded accordingly." On June 25 the respondent replied to this letter, stating: "I can make no other reply to yours of the 18th than to say we seem to be hung up in Neosho for judgment, interest and costs, $7,103.35. My attorney thinks, however, on account of complications that may arise that they can at once be settled with for $6,000. For some other reasons I have telegraphed him to make an offer of $5,000, and I have arranged for his getting the money at once if accepted. The situation is peculiar; to begin your company should have taken advantage of an opportunity open for a year to have settled for $3,500, and up to the affirmation of the appeal for from $4,000 to $4,500. Under the circumstances a nice thing for you to do will be to send me, upon receipt of this, your draft for $5,000 on account, before anything else happens to jeopardize the amount, leaving it to my integrity to make honorable final settlement." On June 28th the appellant replied to this letter, stating: "The offer made you in our letter of June 18th, also holds good in the event that settlement be made for $6,000.00; by this we mean that we think it only fair to us that we receive our pro rata share of any thing saving in the settlement proposition, and that amount contributed by us in the same proportion as our separate responsibility." In the letter, however, the company stated that it refused to send the $5,000 requested by respondent in its letter of June 25th. On July 6th the respondent notified the appellant in writing that it had settled the judgment for $5,203.35, and stating: "I think it is making the amount $5,203.35 net which you surely will not complain of when you were without question held for more than $7,000, on account of not taking advantage of the opportunity to settle for $3,500." On July 8th appellant answered this letter, stating that, according to its previous proposition, it would stand five-sevenths of the amount of the settlement, and would send the draft for the same. On July 11th the respondent answered this letter, stating: "I am in receipt of yours of the 8th, in which you continue your enigmatical treatment of our case with you — what it all means, I cannot understand as there is no such thing in your contract, or rather policy, as fractions of any sort, therefore, your five-sevenths is something not in sight. As I read your policy you are limited to a loss not exceeding $5,000." On August 31, 1910, the appellant sent to the respondent its draft for $3,817.04, being the proper amount due the respondent, if the appellant's contention that it is only liable for five-sevenths of the amount paid to satisfy the judgment is correct. The draft was returned.

Thse letters failed to make a contract between the parties to pro rate the amount paid to satify the judgment. It appears from the letters that the appellant made such an offer, but it also appears that each time it was rejected by the respondent, and that the latter at all times was claiming that, on account of the manner in which the appellant had handled the suit, the amount of the judgment was in excess of what it otherwise would have been, and really it was the duty of the appellant to discharge the same. Of course, the appellant had the right to contest the suit, and was not responsible because the judgment was in excess of the $5,000 covered by the policy, notwithstanding the suit might have been compromised for a less sum. But, on the other hand, the respondent was not

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bound to accept five-sevenths of the amount of the policy, unless it agreed to do so.

It is next claimed that, even though there was no agreement, yet, as the policy required the mining company to render to the insurance company all co-operation and assistance in its power, it was the former's duty to make the best settlement possible, and to give the insurance company the benefit of such settlement. There is no question but what this would be true, if a settlement had been made with the consent of appellant previous to the final determination of the damage suit in the Appellate Court. When Mrs. Overby instituted her suit against the respondent to recover for the death of her husband, and notice thereof was served on the appellant, then under the terms of the policy, the appellant had the right to pay the amount of the indemnity, and be released from any further claim or expenditures. But if for any reason the appellant concluded to contest the right of the plaintiff in that suit to recover, or concluded to compromise the claim or to try the cause with a view of reducing the judgment below the $5,000 indemnity, it had the right to do so, and when it took charge of the suit and carried it to the court of last resort, and lost, then the suit was at an end, and the respondent had discharged its duty under the clause in the policy requiring it to furnish assistance in the suit, and there remained but one thing between the respondent's right to recover from the appellant the amount of the indemnity provided in the policy and that was to satisfy the judgment. In other words, when the judgment was affirmed, the respondent was liable for the full amount thereof, but the appellant was not liable to Mrs. Overby for any part of the same. The only duty the respondent owed the appellant was to make as good a settlement as possible, and, if it was not required to pay $5,203.35 in payment of the judgment, to give the appellant the benefit of the difference. When the true nature of the contract is considered, its purpose was to protect the respondent from any liability whatever up to $5,000, and such costs as were incurred in the litigation, while the appellant had charge thereof. In other words, the appellant agreed to hold the respondent harmless up to that amount, and, unless it took more than the amount of the indemnity to satisfy a judgment or claim, the respondent was not to be called upon to pay any part of the same.

This is an insurance contract, and is to be construed the same as other insurance contracts, to wit, most favorable to the assured. It occurs to us that in the absence of a special agreement the only duty the respondent owed the appellant after the judgment had been affirmed was to proceed in good faith to satisfy it by the payment of as small amount as possible. But, if in doing so it was required to pay more than the amount of the indemnity, this in no wise relieved the appellant from a full performance of its contract.

The last assignment of error relates to the action of the court in allowing $250 attorney's fee and damages for vexatious delay in the payment of the indemnity.

Complaint is made to the introduction of certain letters on this branch of the case, but, in view of the disposition made of this part of the judgment, it will not be necessary to consider this complaint.

The objection to this part of the judgment is that the statute in force at the time this suit was instituted did not authorize a judgment for damages or attorney's fees. The statute referred to is section 7068, and reads as follows: "In any action against any insurance company to recover

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the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss and a reasonable attorney's fee."

The question is, do the words "or other insurance," include the contract sued on in this case? If the statute did not expressly name any kind of insurance, but used general words, then it would cover all kinds of insurance contracts, as the rule is well established that, where a statute contains general words only, such general words are to receive a general construction, and the effect of them is not to be limited except by express words in the statute itself. Davenport v. Hannibal, 120 Mo. 150, 25 S. W. 364.

The rule is equally as well settled that where a statute enumerates particular classes of persons or things, followed by general words, the general words will not ordinarily have a general meaning, but will be limited in their meaning to objects of the kind and character specified. St. Louis v. Laughlin, 49 Mo. 559. As said by the presiding judge of this court, in Wonner v. Carterville, 142 Mo. App. 120, 125 S. W. 861: "The rule unquestionably is that, where general words follow particular ones, the courts will construe them as applicable only to persons or things of the same general character or class, and cannot include things wholly different from those specifically mentioned." The rule that general words following particular ones will be limited to the same class as the particular ones does not apply in full force in all cases. The rule is resorted to merely as an aid in the construction of statutes, and where, on a full consideration of the entire statute and the purposes the legislature had in view in enacting it, it is apparent that the legislature intended the general words to include classes not specially designated, the general words must be given a meaning beyond the special class. State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179.

It is also true, if the particular words exhaust the class, then the general words must have a meaning beyond the class, or be discarded altogether. National Bank v. Ripley, 161 Mo., loc. cit. 132, 61 S. W. 587.

Another well-settled rule to be considered in construing the statute is that it is highly penal, and should not be held to apply to any company or class of insurance that is not plainly included by its provisions. It is apparent that without the general words the appellant's business is not included in the statute, and therefore, if it is subject to the provision of the statute, it is made so by the general words. It is equally apparent that the particular words do not exhaust the class, and therefore, if the general rule is not to be applied, it must be for some other reason.

The statute expressly names three kinds of insurance, to wit, fire, life, and marine. These classes of insurance are common, and have been in general existence for such length of time "that the memory of man runneth not to the contrary." This statute was first enacted in 1865, and continued in force without material change until 1911, when the legislature amended it so as to expressly include indemnity contracts of insurance. At the time the statute was enacted, there were certain classes of insurance other than the ones expressly named therein, and it may well be said that it was such insurance that the legislature intended to cover by the general words. The words "other insurance" may include windstorm or cyclone insurance, as such insurance would undoubtedly belong

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to the same class as fire insurance, as the loss would be the same, and of the same character, whether a man's house was burned or blown away.

While it is not conclusive, it is to be considered in construing the statute that the character of insurance written by the defendant was not in existence at the time this statue was enaced. City of Carthage v. Carthage Light Co., 97 Mo. 20, 70 S. W, 936. In Breeden v. Insurance Co., 220 Mo. 327, 119 S. W. 576, in speaking of this character of insurance, the court said: "Indemnity insurance, as understood in this class of litigation, is of comparatively recent origin. After a careful investigation I have been unable to find any policy of that character antedating the year 1886."

The fact that the legislature in 1911 amended the statute so as to clude this character of insurance is strong evidence that it was the opinion of the lawmakers that it was not included in the prior statute. Strottman v. Railroad, 211 Mo. 227, 109 S. W. 769; Crohn v. Telephone Co., 131 Mo. App. 313, 109 S. W. 1068. In Strottman v. Railroad, supra, the question was whether a certain right existed prior to a statute enacted in 1905, and the court said relating thereto: "The passage of the act of 1905 tends to show that it was the opinion of the lawmakers that no such right existed prior to that time; otherwise, there was no occasion for its passage." In the same case, Judge Lamm delivered a dissenting opinion, and on this point said: "If the act (1905) related to and covered only one subject, to wit, the keeping alive (after the death of the injured party) of a cause of action arising in favor of such party, then there would be great force to the insistence that in the legislative mind such cause of action up to that time did not survive, and the new act of 1905 created the right of survival." This language of Judge Lamm's is specially applicable, because the amendment of 1911 only included one subject and that was to add to the existing statute, by express terms, other kinds of insurance.

This suit was instituted before the act of 1911 went into effect, and the respondent does not claim that this amendment can be looked to to sustain this part of the judgment.

The premises considered, we are of the opinion that the statute in force at the time this suit was commenced did not include within its provisions insurance companies issuing indemnity contracts insuring against common-law negligence, as such insurance is not of the same class as ordinary fire, life, and marine insurance.

If the plaintiff will within 10 days file a remittitur for $251, the penalty imposed, with the legal rate of interest thereon since the date of the judgment, we will order its affirmance for the sum of $5,203.35, together with interest since the date of the commencement of this suit, otherwise the judgment will be reversed and the cause remanded. All concur.

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Decision No. 1489.

O'SHIELDS v. POFF.

(Court of Civil Appeals of Texas, Ft. Worth. Feb. 3, 1912. Rehearing Denied March 2, 1912.)

144 S. W. 1044.

BILLS AND NOTES — INTEREST.

A petition filed November, 1910, alleging that defendant guaranteed payment of a series of ten vendor's lien notes held by plaintiff, which were respectively due March 5, 1910, and in succeeding years in stated monthly instalments and bearing annual interest payable as it accrued, that it was stipulated that a failure to pay any of the notes or any instalments of interest due thereon should, at the election of the holder, mature all the notes, and that, though plaintiff had demanded the interest, defendant had not paid, does not show that the action was prematurely brought before the debt had matured, for the petition does not declare on a note maturing March 5, 1910, but contains allegations sufficient to indicate that such note was one of a series payable monthly thereafter, and that payment of the annual interest on all of the notes had been refused.

In an action on eight notes, due on or before the 5th day of March of eight successive years, said notes being due in monthly instalments, and each note and instalment thereof bearing interest at eight per cent. per annum, "said interest payable as it accrues," the words "payable as it accrues" mean "annually;" that is, eight per cent. interest per annum.

Appeal from Districe Court, Tarrant County; W. T. Simmons, Judge.

Action by Earl W. Poff against C. M. O'Shields and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Massie & Poulter, for appellant. Ben S. Baldwin and Baskin, Dodge & Eastus, for appellee.

SPEER, J. Earl W. Poff instituted this suit in the District Court of Tarrant county to recover on a series of vendor's lien notes executed by defendant H. A. Wright and assumed by defendant C. M. O'Shields in a subsequent purchase of the property by him from Wright. On the trial the court gave a peremptory instruction to find for the plaintiff, and the defendant O'Shields has appealed.

The contention of appellant is that the court erred in summarily instructing a verdict for the appellee becaues the petition upon which the verdict and judgment are based shows that the suit was prematurely brought, in that the debt sought to be recovered had not matured. The allegations of the petition describing the indebtedness are as follows: "On or about the 5th day of February, A. D., 1909, the defendant H. A. Wright made, executed, and delivered to plaintiff his certain ten vendor's lien notes for the sum of $3,000, the first nine of said notes being for the sum of $330 each and the last of said notes for the sum of $30, each bearing date on the day and year last aforesaid, due on or before the 5th day of March, A. D., 1909, March 5, 1911, March 5, 1912, March 5, 1913, March 5, 1914, March 5, 1915, March 5, 1916, and 1917, and monthly thereafter, said notes being due in monthly instalments of $27.50 each, each of said notes aggregating the sum of $330, except the last of said notes, which is for the sum of $30, each of said notes payable to the order

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of plaintiff at Ft. Worth, Tex., and each note and instalment thereof bearing interest at the rate of 8 per cent. per annum from date, said interest payable as it accrues, both the principal and interest in the instalments as shown by said notes and conveyance of said property hereinafter described and said notes providing and stipulating and it being agreed and understood that 10 per cent. of the amount of principal and interest then due should be entered as attorney's fees," etc. "Plaintiff alleges and says that it was agreed and understood, and so provided and stipulated in said notes, that a failure to pay any or all of said notes, or any instalment of interest thereon due when due, should, at the election of the holder of them, or any of said notes, mature all notes then given by the said defendant. Plaintiff alleges that the said defendants refused to pay this interest upon each instalment note from the date of execution, and that he has often requested them to do so, and they refuse to pay same, and that he has been forced to declare all of said notes due," etc. The notes were attached to the petition as exhibits and were numbered consecutively, from 2 to 10, inclusive. The first note the petition admitted had been paid. Note 2, according to the exhibit attached to the petition, was for $330, and matured "on or before March 5, 1910, and monthly from March 5, 1910," and was payable "in the sum of $27.50 per month for 12 months from March 15, 1910." It provided for interest from date February 5, 1909, until paid at the rate of 8 per cent. per annum, the interest payable as it accrues. This suit was filed in the District Court on November 1, 1910. The allegations of the petition, when construed in the light of the exhibits attached, show that the suit was not prematurely brought. The body of the petition does not declare on a note maturing March 5, 1910, but it does contain allegations sufficient to indicate that such a note was one of the series and in the light of the exhibit, indorsed note No. 2, should be construed as a declaration on a note maturing March 5, 1910, "and monthly thereafter," the monthly payments of which amounted to $27.50. But aside from this petition declares, and the notes show, that each of them bears interest from date at the rate of 8 per cent. per annum, same payable as it accrues, and the petition further declares that the defendants have failed and refused to pay such interest, and the plaintiff elects, as he is authorized to do, to declare the entire indebtedness due. We construe the language relative to the interest "as it accrues" to mean annually; that is 8 per cent. interest per annum. "Payable as it accrues" means that the same is payable annually.

We find no error in the judgment, and it is affirmed.

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Decision No. 1490.

BERBERET et al. v. MYERS et al.

(Supreme Court of Missouri. Feb. 9, 1912.)

144 S. W. 824.

BROKERS — CONTRACTS — PRINCIPAL AND AGENT — REVOCATION — SPECIFIC PERFORMANCE — VENDOR AND PURCHASER — BOUNDARIES.

A contract, whereby vendors appointed real estate brokers as their agents to enter into a written contract for the sale of land, with the provision that if they should withdraw the property from sale before 1905 the brokers should receive certain compensation, does not, by its terms, expire in 1905.

A naked agency not coupled with an interest may be revoked, contrary to its provisions, and the revocation cannot be called in question by third persons.

A reduction of a contract to writing supplants all prior or contemporaneous verbal agreements.

While, upon proper pleadings, equity will relieve a person from a written contract entered into through fraud or mistake, vendors of land who entered into a contract giving a broker an agency for its sale cannot, where the contract was a continuing one, be relieved from a sale made by him merely because they understood that the agency was to expire at a given time; their understanding being immaterial to the interpretation of the contract.

While the chancellor has a discretionary duty in decreeing specific performance, his discretion is a legal one, and relief cannot be denied where the contract is fair and equitable, and so a purchaser of land whose contract is fair and equitable may have specific performance regardless of his remedy at law.

Where a principal enters into a contract of agency, powers essential or usual to those granted are implied, but a substantial departure from both express and implied power will not bind the principal, and hence, where a principal gave an agent power to enter into a contract for the conveyance of land without fixing the date for the time of conveyance, the agent might fix the date.

Where a broker was given power to sell land for cash, a contract, whereby part of the purchase price was to be paid at the time of entering the contract, and the remainder upon delivery of the deed, was within his powers and binding on the principal.

Where the entire purchase price of land was tendered to the vendor, he cannot complain that part of it was improperly paid to his broker in the first instance.

Where an agent, having the power to sell land, entered into a contract providing that his principal should pay interest on earnest money deposited by the purchaser, the principal cannot complain that the agent thereby exceed his authority, where the purchaser has made no claim for the interest.

As the law disregards small things, an agent's agreement to pay a very small interest on earnest money, deposited to bind a contract for the sale of land, will not invalidate the contract, though the agent was not authorized to agree to such payment.

Where a contract authorized real estate agents to contract for the sale of their principal's land by satisfactory deed, a contract of sale providing for the execution of a warranty deed was not in excess of the agents' authority.

The call for quantity may be resorted to, to aid in locating descriptions which would otherwise be uncertain.

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In an action for the specific performance of a contract for the sale of land entered into by vendor's agent, defenses that the agent exceeded his authority are affirmative and must be pleaded.

A real estate agent was given, by written contract, power to enter into written contracts for the conveyance of land owned by his principal. Held, that while Rev. St. (Mo.) 1909, § 2783, required the agent to be authorized in writing to enter into contracts for a conveyance, such contract need not be recorded or acknowledged in accordance with section 2816, providing that every letter of attorney containing a power to convey real estate as agent shall be acknowledged and recorded, for in this case the power was only in contracts with the principal to convey, and the last section does not invalidate conveyances between the parties.

In Banc. Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Suit by Nicholas J. Berberet and another against Georgia Myers and others. From a decree for plaintiffs, defendants appeal. Affirmed.

F. E. Roberson and A. Deneghy, for appellants. L. F. Cottey and F. H. McCullough, for respondents.

LAMM, J. Equity. Relief sought, specific performance of a contract to convey land in Knox county.

The bill, summarized, counts on the following facts: That defendants owned the following land in fee simple: "The west end of the north half (240 acres), the southeast fourth of the northeast quarter (40 acres), and the northwest fourth of the southwest quarter (40 acres), of section fourteen (14), township sixty-two (62), range twelve (12), west of the fifth principal meridian, and containing in the aggregate 320 acres, more or less, in Knox county, Missouri." And on the 9th day of February, 1904, they executed a contract, a warrant of authority to a certain partnership, real estate agents, doing business under the name and style of the Parsons Real Estate Agency of Edina, Mo., authorizing said agency to enter into a written contract with a purchaser in defendants' behalf and names to sell and convey said land, thereby agreeing that if their agents sold the land, they, on their part, would make a good and satisfactory deed, and (if required) give a clear abstract of title. As remuneration the agents were to receive $1 per acre "out of the first money collected." The land to be sold at a sum to net defendants $11,200. If sold by other parties, defendants were to pay the agency $25 to cover cost of advertising. If defendants wished to withdraw the land from market or advance the price, then, in such event, defendants agreed to give their said agents written notice 30 days prior to such withdrawal or advance. They further agreed to pay said agents $25 for advertising should they withdraw the real estate from market prior to January 1, 1905; no change in price or terms by defendants to work a forfeiture of commissions, and the terms of sale contract to be cash on executing a deed. Alleging that while said contract of agency was in full force, and with no notice to the agents or either of them by defendants or any of them of the withdrawal of the land from market or an advance in price, defendants' said agents in their names contracted in writing with plaintiffs on September 12, 1906, to sell the land at a total price which, deducting commissions, made the net contract price, whereby $1,000 were to be paid on the execution of the contract of sale, the balance when the deed and possession were delivered on or before March 1, 1907; that defendants, by said sale contract, agreed to

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furnish an abstract of title and execute a good and sufficient warranty deed and deliver possession on or before March 1, 1907; that on the contract date plaintiffs paid to said agency for and on behalf of defendants the said sum of $1,000, and afterwards and before March 1, 1907, offered and tendered to defendants and each of them the amount of the money due them respectively and demanded a deed, and again on March 1st they made another tender to the agency of the balance of the purchase price, and through defendant's said agents demanded of defendants the execution of a deed and possession in accordance with the terms of the sale contract; that defendants failed and refused to accept such tender or execute such deed and deliver an abstract, and ever since have failed and refused to abide the contract; that at all times plaintiffs have been and now are able, ready, and willing to comply on their part and to pay the purchase price. Tender of the price in compliance with the contract is then made by the bill, and it prays that defendants be compelled to perform in specie, or, in lieu thereof, that the court decree title out of them and into plaintiffs, after ascertaining rents and profits from March 1, 1907, until possession be given, and that judgment be rendered therefor.

Because of contentions raised here, the answer had best speak for itself, viz.: "Come now the defendants, and for answer to the plaintiff's first amended petition filed herein, admit that on the 9th day of February, 1904, they were the owners of the lands described in the petition, and were in the possession thereof. Admit that on said date the defendants entered into a written contract with the Parsons Real Estate Agency, authorizing it as their agent to sell said lands for the defendants, and to enter into a written contract of sale for the defendants, as alleged in the petition. But defendants say that contract was not acknowledged and recorded as required by law and is therefore of no force and effect, and confers no power on the Parsons Real Estate Agency to make a sale of said lands for defendants. Defendants, further answering, say that if the said contract is binding on the defendants and does confer power on said real estate agency to sell said lands as agent for defendants, then the said agents, under said contract, had until January 1, 1905, the right, power, and authority to sell the same; and that if the said agent did enter into a contract for the sale of said lands with these plaintiffs after January 1, 1905, it was done without any right, power, or authority to do so, and was done without the knowledge, consent, or direction of the defendants, has not been ratified by them, and is not binding on them. Defendants, further answering, say that if there is anything contained in said written contract of agency between them and the said Parsons Real Estate Agency that could from a reading of said contract be construed to extend the said agency to a time subsequent to the 1st day of January, 1905, then the insertion of the same was a mistake, as it was understood and agreed by the defendants and the said Parsons Real Estate Agency at the time of signing the same that the agency was to terminate on the said 1st day of January, 1905, and the defendants signed said contract understanding and believing that the same was to terminate on that date. Defendants, further answering, state that shortly after January 1, 1905, and long before the 12th day of September, 1906, the time at which it is alleged in the petition the said agency entered into a contract of sale for the lands mentioned in the petition with the plaintiffs, the said Parsons Real Estate Agency was informed by another, the agent of the defendants, that the said lands were no longer for sale, and that the said agency, by a member of its firm, said to the agent of these defendants

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that the contract aforesaid, under which they were empowered to sell said lands, had expired, and asked the agent of these defendants if he knew what the defendants intended doing with the lands. Therefore the defendants say that the said Parsons Real Estate Agency knew that their power and authority to sell said lands, if any, had terminated January 1, 1905, and that it had no right, power, or authority to sell the same after that date. Defendants, further answering, deny each and every other allegation in the petition set out and contained. Defendants, having fully answered, pray to be discharged with costs."

The reply denied allegations of new matter.

The contract of agency, after conventional recitals and describing the land as in the petition, reads: "We hereby appoint and constitute the said Parsons Real Estate Agency as our agents and authorize them to enter into a written contract for us, on our behalf and in our names, for the sale of said real estate. We agree to make a good, satisfactory deed and, if required to do so, to give clear abstract of title to said real estate, showing title to be clearly vested in us. In consideration of the said Parsons Real Estate Agency's services in making such sale, we agree to pay said Parsons Real Estate Agency, out of the first money collected, the sum of one dollar ($1.00) per acre, commission on said sale of property, the said property to net the said heirs eleven thousand two hundred dollars ($11,200). If sold by other parties we will pay said Parsons Real Estate Agency twenty-five dollars ($25.00), to cover costs of their advertising, payable at Edina, Mo. Should we wish to withdraw the above property from market, or advance the price, we agree to give said agency a written notice of thirty days prior to such withdrawal or advance. We agree to pay said agency twenty-five dollars ($25.00) for advertising, should we withdraw said property from sale before January 1, 1905. Any change in the price or terms agreed to by us shall work no forfeiture on commission due said agency, in case of sale and transfer of said property. Terms of sale to be cash when deed is transferred. Dated this 9th day of February, 1904.

The contract of sale, after reciting its date and the names of defendants, as parties of the first part, and plaintiffs as parties of the second, reads: "Parties of the first part hereby agree to sell to parties of the second part, on the performance of the agreements of the parties of the second part, as hereinafter mentioned, clear of all liens and incumbrances whatever, by a good and sufficient warranty deed, the real estate, situated in the county of Knox and State of Missouri, to wit: West end of the north half (½) and the southeast quarter (¼) of the northeast quarter (¼), northwest quarter (¼) of the southwest quarter (¼) of section fourteen (14), township sixty-two (62), range twelve (12), west, containing three hundred and twenty (320) acres of land, at thirty-six dollars ($36) per acre, for the sum of eleven thousand, five hundred and twenty dollars ($11,520), payable as hereinafter mentioned. The said parties of the second part, in consideration of the premises, hereby agree to and with the parties of the first part, to purchase all his right, title and interest in and to the real estate above described, for the sum of eleven thousand, five hundred and twenty dollars ($11,520), and to pay said sum therefor to the parties of the first part, his heirs and assigns, as follows: One thousand dollars ($1,000) on the execution of this agreement; ten thousand five hundred and twenty dollars ($10,520) in payment, to wit: When deed and possession is delivered on or before March 1, 1907. First party is to furnish abstract showing title to be full vested in them. First

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party is to pay taxes prior to and falling due on January 1, 1907. First parties are to allow three (3) per cent. interest on the one thousand dollar payment, from the date of this contract to the delivery of the deed and possession of the land."

The foregoing contracts of agency and sale were put in evidence. Following that, the material proof lies in small compass. There was testimony that some of the members of the Parsons Real Estate Agency were managers of a bank at Edina. In the light of this record, they appear responsible and reputable. So, defendants are spirited people of good business sense. Certain of defendants are owners of the land as tenants in common; others are husbands of those who are married women. The real estate was rented and out of repair; its owners residing elsewhere in the State. At the inception of the agency contract the land was in charge of a cousin of theirs, Prof. Eugene Funk, then the head of the city schools of Kirksville, a gentleman of pronounced business capacity and education. The land was for sale. He applied to the Parsons Real Estate Agency to make one. After one or two abortive attempts to come to an understanding, in which the contracts prepared by said agency were turned down by defendants, finally Prof. Funk himself drew an agency contract — the one in evidence. The agents were not present and had no lot or parcel in its genesis. Prof. Funk forwarded it to the several defendants by mail, and it was signed severally by them and finally forwarded to and accepted by the Parsons Real Estate Agency as a completed instrument.

The proof is such that the chancellor could not well have found that the agents' authority was revoked, or that the land was withdrawn from the market, or the price altered by any notice whatever to the agents after the date of the warrant of authority up to the date of the sale contract in evidence. When the sale in question was made, defendants were notified, but refused to consummate it, at that time making the sole objection that the contract authority to sell lapsed on the 1st day of January, 1905. Defendants were allowed to testify, over the objections of plaintiffs, that they severally understood the contract to be that it expired automatically on January 1, 1905, and that they intended to say so in the contract. There was no issue in the pleadings or proof offered of fraud, surprise, accident, or mutual mistake. The unquestioned proof is that the land sold for its actual value; that the sale was bona fide; that timely legal tender was made of the entire purchase price to each defendant in the amount due each, and performance was demanded; that such tender and performance were severally refused. At the trial a further tender of the price was made in gold coin in open court and again refused. The decree finds the facts in detail; hence is long and very full. Its terms are not necessary for this review. In brief and in effect, it found the issues for plaintiffs, decreed performance of the contract in specie, and vested title out of defendants and into plaintiffs on terms imposed. It found the rental value, took an accounting of rents, and gave judgment accordingly.

The points relied on for reversal apparently are: (1) The bill states no cause of action. (2) The contract of agency pleaded in the petition is not the contract put in evidence. (3) Properly construed, the contract of agency, ex vi termini, expired on the 1st day of January, 1905, and therefore the contract of sale made at a later date is without authority. (4) If its terms are unfortunate in that respect, then the understanding

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and intention of defendants (prenatal, natal, or postnatal to the contract) must control and, under this record, make it expire on that date. (5) At all events, plaintiff's remedy is at law for damages, and not in equity for performance in specie; hence the chancellor unsoundly exercised his discretion in that regard. (6) The sale contract did not follow the power, but was in excess of it (and herein of the fact that it called for 3 per cent. interest on the $1,000 advance payment, it called for a "warranty" instead of a "satisfactory" deed, it did not give a sufficient description of the land). (7) The agency contract was not acknowledged and recorded; hence performance should not be decreed. There are some minor questions discussed by counsel, but they logically fall within the propositions stated. Such of them as are material will receive attention in the course of the opinion. The question is: In view of the premises, can the decree stand?

I. Did the bill state a cause of action?

Defendants did not demur to the bill, or object to evidence thereunder. By such failure they waived two opportunities to challenge its sufficiency. There was a long trial. The chancellor took time to consider; his decree following some months later. For the first time in the motion in arrest defendants raised the point of a bad bill. The rule is that a challenge to a petition at the threshold stands on a better foot than a challenge after a verdict or judgment. In support of a decree under such circumstances, the bill will be viewed with a less critical eye than if challenged in limine by a demurrer. We have been so lately over this ground in East St. Louis Ice & Cold Storage Co. et al. v. Kuhlmann et al., 142 S. W. 253 (not yet officially reported), that we refer to that case for the rule and its underlying reasons.

If, however, a bill is so radically bad as to state no cause of action, such defect is in its nature jurisdictional and may be raised on appeal for the first time where the defects are of a character not cured by the statute of jeofails. Childs v. Railroad, 117 Mo., loc. cit. 427, 23 S. W. 373, and cases cited; Hanson v. Neal, 215 Mo., loc. cit. 278, 114 S. W. 1073. After a verdict or decree, the grace of every allowable implication is permitted in aid of the verdict or decree, and all mere ambiguities in allegation are resolved in its favor.

There is no fatal vice on the face of the bill as a pleading, and we rule the point against defendants. Indeed, the points made by counsel under this head fall naturally under other subdivisions of their brief.

II. Was the contract of agency, pleaded in the bill, the contract put in evidence?

They agreed in date, subject-matter, and parties. There is no pretense any other existed. Not only so, but the answer admits defendants made the contract authorizing their agents to sell their lands "and to enter into a written contract of sale for the defendants, as alleged in the petition." In the face of such facts and such broad admission, there is no substance in the point. It is also ruled against defendants.

III. We come to consider the third and fourth questions, viz.: (1) Does the contract expire by its terms on January 1, 1905; or (2) if not, is it made to expire on that date by reading into it the intention and understanding of defendants as outlined on the witness stand?

Both must be answered in the negative. By its terms the contract is unlimited in time. There is a provision in it for withdrawing the land from market, which, in effect, would be a revocation. There is another for advancing the price; but, as between the agents and the principals,

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30 days' written notice was necessary in either event. We shall not rule that such time provision as to third parties, like plaintiffs, is preclusive.

A naked contract of agency — that is, one not coupled with an interest — may be revoked by the principal, and, absent matter of estoppel, that revocation cuts away the agent's power to deal with third parties on the subject-matter of the agency. Whatever the rights between a principal and agent, inter sese, the right to revoke an unexecuted naked power cannot be called in question by third parties.

But here there is neither a plea of revocation, nor is there substantial or uncontradicted evidence of revocation. True, a witness for defendants, Prof. Funk, testified to a conversation with one of the agents, from which it might be inferred that both sides assumed the contract was at an end prior to the sale to plaintiffs. That conversation is pleaded by way of defense in the answer, possibly on the theory that the contract was ambiguous and that the construction put on it by both parties is of service in getting at its meaning. But this contract is not ambiguous. There is no room left for construction. It was written by a man who well understood the Englsh language, who was skilled in knowing how to express his ideas with perspicuity and did so, who was kin to defendants and was alert to their interests. Its origin does not invite criticism. The contract speaks for itself in no uncertain or unsteady voice. Moreover, the conversation, as related, was denied by the agent. The trial chancellor was at liberty to take the version of one or the other. When men sit down to put a contract in writing and do so, the presumption is they write all there is of it. All prior or contemporaneous verbal conversations relating to the subject-matter are presumed merged in the writing. The precept to go by is: The spoken word flies; the written word remains. (Vox emissa volat, litera scripta manet.) However, men labor under such infirmities of mind and memory that mutual mistakes are made, or fraud, imposition, surprise, or accidents sometimes happen. In such case, when proper issues are made, relief goes in equity. But to get that relief the pleadings must raise such issue and the proof must respond to the pleadings. Here there is neither proof nor allegation of that kind; the contract was drawn, as said, by their trusted and gifted kinsman, and to permit the parties to a contract to vary its terms by parol proof, or by their secret or mistaken understanding of its obvious meaning, would be a doctrine unheard of — one as anxious as new. It would make contracts as unstable as water, and subject the dealings of mankind to incurable paralysis.

We may be permitted with profit to present the language of Chief Justice Kent in Bebee et al. v. President, etc., of Bank of New York, 1 Johns. (N. Y.) loc. cit. 572, 3 Am. Dec. 353 — language approved by so eminent an authority as Broom (Broom, Legal Maxims [8th Eng. Ed.] p. 517): "It is a sound rule of evidence that you cannot alter, or substantially vary, the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries, and it cannot be too steadily supported by courts of justice. Expressum facit cessare tacitum; vox emissa volat; litera scripta manet — are law axioms in support of the rule. And law axioms are nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages. This rule prevails equally in a court of equity and a court of law; for generally speaking the rules of evidence are the same in both courts. If the words of a contract be intelligible, says Lord Chancellor Thurlow (Shelburne v. Inchiguin, 1 Bro. 341), there is no instance

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where parol proof has been admitted to give them a different sense. Where a deed is in writing, he observes, in another place (Jonham v. Child, 1 Bro. 93), it will admit of no contract which is not part of the deed. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, an agreement is, by fraud or mistake, made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule. But the allegation of fraud or mistake must be made in the bill, before evidence to those points can be received. Cripps v. Jee, 4 Bro. 472."

Here was a contract of agency. Its life and purpose was to empower the agent to deal with third parties in vital matters. True, third parties are put upon inquiry as to the power of an agent to sell real estate and must deal with the agent with the power before them, or presumptively before them. Yet the rule of law is that such third parties are not interested in the secret processes of the principal's mind. They get at what was in the principal's mind by the visible result evidenced by the writing. They are interested in the character in which the agent is held out by the principal to those who may have occasion or opportunity to deal with him. "This character is a tangible, discernible thing, and, so far as third parties are concerned, must be held to be authorized, as it is the only expression and evidence from which the principal intends that they shall determine his purposes and objects." Mechem on Agency, § 278; Kilpatrick v. Wiley, 197 Mo., loc. cit. 166, 95 S. W. 213.

We rule both propositions against defendants.

IV. Is plaintiffs' only remedy at law for damages?

The scope of this contention is leveled at the discretion courts of chancery exercise in decreeing performance in specie. The rule is that specific performance is somewhat of grace as over against a hard and fast matter of absolute right. The chancellor has discretion to perform or not to perform. But he has studied the law of specific performance to little purpose who supposes that discretion may be exercised without reason and of caprice. The discretion to be exercised is a sound (that is) judicial discretion. It is exercised against performance when plaintiffs come into a court of equity with unclean hands; or when the contract is incomplete or so ambiguous as to be uncertain in terms and intendment; or where the contract is unfair, overreaching, biting; or when there are present (in pleadings and proofs) elements of mutual mistake in matter of substance, covinous contrivances, fraud, imposition, surprise, or accident, as those terms are understood in the law. Absent such features, and present a fair, plain contract, one complete and certain in terms and intendments, specific performance goes as a matter of right. The most direct and satisfactory remedy which a party instinctively seeks is specific performance when he is injured without fault on his own part by the nonfulfilment by the other party of an agreement explicit and just in its terms, relating to a sale of real estate. Woodbury v. Gardner, 77 Me., loc. cit. 69; Kirkpatrick v. Pease, 202 Mo., loc. cit. 493, 494, 101 S. W. 651. Specific performance produces a practical result, a more complete and rounded justice than mere money damages. The maxim is: Equity delights to do justice, and that not by halves. In the absence of inequitable features in real estate contracts, to perform them in specie by court of conscience is but to require one man to keep his plighted word to another — a thing that touches honor and is good ethics and sound equity — is but to see to it that he is made to do as he would be done by. That

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golden rule is a very good definition of equity. Justinian puts it: To live honestly, to harm nobody, to render to every man his due. Bl. L. Dict. tit. "Equity."

It is argued that damages at law will sometimes go for nonperformance when performance in specie in equity will not go. In other words, that it is easier to make a case at law than in equity. We have no bone to pick with that proposition. But it is a boneless contention here. Our question is not whether plaintiffs could recover damages at law or whether the obstacles in the road of such recovery are more easily surmounted than are those in the way of performance in kind; for, after all, the crucial question is: Are these plaintiffs entitled to the very thing contracted for, to wit, the land?

On the question of market value, uncontradicted testimony went in on behalf of plaintiffs that the land sold for all it was worth, and that there had been no change in the market price between the time of making the agency contract and that of making the sale contract. However, there was a bit of evidence on the part of defendants to the effect that some other real estate agent suggested or offered $37.50 per acre (a dollar and a half more), or asked if defendants would take $37.50 an acre, and defendants were not willing to dicker on that basis. If this evidence were given full probative force as indicating a real bid, it would amount to nothing in the absence of other testimony that defendants' agents knew of such offer, or in the absence of notice to them of a change of price, or of a revocation of their power, or evidence of lack of good faith.

We rule the main and minor propositions discussed under this head against defendants.

V. Did the contract of sale follow the power, or vary from it materially? (And herein of certain subsidiary questions.)

(a) When a main power is granted, incidents essential or usual to the exercise of that power are also granted — the greater includes the less by necessary implication. Incidentia rei tacite sequuntur. But a substantial departure from both the express and implied power does not bind the principal. He can say when called on to perform: I did not agree to those terms. (Non hæc in fœdera veni.)

Assuming said general propositions sound, how does the case stand? The contract of sale provides for the execution of a deed and delivery of possession on the 1st of the following March. The contract of agency says nothing about that. Counsel do not argue that particular provision is in excess of the power, and yet it is of more substance than any departure contended for. Evidently, to make a perfect contract, it was necessary to fix a time for the consummation of it. That time, to be reasonable, should be the usual time for the expiration of tenancies — the beginning of a cropping season. It is common knowledge that March 1st is such in this latitude. The main power to contract carried the power to fix a time, and defendants tacitly acquiesce in that view of it. The wisdom and necessity of exercising the implied power we have just considered is seen at a glance; for the land was rented and for rent, and if possession was to be given at any other time defendants stood to be ground by an upper and nether millstone. They would have to reckon with their present or prospective tenants as well as their vendees.

(b) But it is argued the power granted contemplated only one cash payment, whereas the sale contract provides for two — one to bind the bargain (to use a chimney corner phrase); the other at the time the deal was to be consummated. But is it so clear that it looked to only one

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payment, so long as the transaction was put on a cash basis at the moment of consummation? The agency contract provided that the agents should receive their commission "out of the first money collected." Did that provision not imply more than one collection of money? We think so.

But aside from that, the gist of the agency contract in the particular now up is that there should be no time payments after the deed passed and possession was given — that the transaction was cash. The owners wanted their shares cash in hand. They had the right to make their own terms in that respect, and they did so. If A. is to pay for B.'s property at the time deed and possession are delivered, to wit, on Thursday, and A. pays part Monday, part Tuesday, and part Wednesday, that arrangement results in a cash transaction on Thursday and meets the contract intendment. Q. E. D.

(c) It is also argued that the first payment was to defendants' agents; that the power did not contemplate a payment to those agents; therefore it was in excess of the power and no payment at all. The argument proceeds on the theory that in receiving that payment those agents did not act on behalf of defendants but, pro hac vice, because agents of plaintiff in handling that money. We shall not rule that the power granted in this instance was authority to the agents to receive payment, though the right to receive their commission out of the first payment squints that way, and this view is strengthened by the other facts that the vendors were widely scattered, were not present to receive any money, and made no provision for any depository or person to receive payment on their behalf.

If those agents had retained that money, we would have a different case to deal with. But they did not retain it. It was tendered timely, with the whole contract price, to defendants severally. In such case it is a waste of time to consider or rule the question whether the agents had authority to receive the first payment and bound their principals by the receipt of the money. It is enough to rule, as we do, that the tender bound them, if they were not bound before. Since this is not a case where plaintiffs plant themselves on a payment to agents and seek to bind the principals without a tender to them, in propria persona, of the whole contract price, it will be time enough to deal with such a case when it is here.

(d) It is also argued there was a fatal variance between the power and the sale contract because of the provision that defendants pay 3 per cent. interest on the advance payment from September 12th to the 1st of the coming March. A bank deposit of that amount made at the time the payment was made would add to itself the amount resulting from that rate per cent., thereby making defendants whole if they, in turn, received interest in the usual course of banking business in a saving bank. Since the power contemplated a cash payment on the 1st day of March ensuing, it is not straining the power, nor would it produce injustice, to read into it the idea of the worth of the money at the time of the final payment. That theory was advanced, arguendo, in Kilpatrick v. Wiley, 197 Mo. 168-171, 95 S. W. 213.

But we prefer to rest our decision on this point on the following propositions: First, the pleadings raise no such issue; second, plaintiffs ask nothing by virtue of the provision (their tender disregarded the interest); and, third, the whole matter is akin to a tempest in a teapot. In its nature it could (and did) result in no injury. De minimis non curat lex.

(e) The agency contract called for a "satisfactory deed"; the sale

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contract called for "a warranty deed"; it is argued that is a material departure from the power. We think otherwise. The word satisfactory relates to a person; it implies a mental state. What person? Whose mental state? It cannot be soundly argued that vendors were contracting to convey by a deed satisfactory to themselves. That would be a poor inducement to purchase and a stumbling-block in the way of a sale. It would tend to defeat the very office of the agency contract; hence is unthinkable. The purchasers have a vital interest in the form of the deed and the power contemplated that they were the ones to be satisfied. We are of opinion an agent, who has authority to contract for a satisfactory deed, has power to contract for a warranty deed. Warranty deeds are usual deeds; quitclaim deeds are exceptional. They are rarely taken where a full consideration is paid and a clear title is contracted for, as here; for they cut off covenants and are a red danger signal of equities behind.

(f) It is next argued that the sale contract misdescribes the land. The argument travels on the theory that only 80 acres of the land is described therein; hence the sale contract does not follow the power. As to that we rule: (1) No such contention was made below and should not be made on appeal. (2) There is a solemn admission in the answer to the contrary. (3) There is no merit in the point. The number of acres are the same. The two forties are described correctly. These quarter quarter sections, being in a section not on a range or township line, are bound to contain 40 acres each. Deducting the 80 acres in the two from the total 320 acres given, leaves 240 acres to answer to the description of the "west end of the north one-half" of section 14, precisely as does the agency contract which runs as does the petition, viz.: "The west end of the north half (240 acres)."

"The rule of law is well settled in this State that the call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain, and especially is this true where lands are described by sectional subdivisions, as in the case in hand." Davis v. Hess, 103 Mo., loc. cit. 36, 15 S. W. 324.

(g) Finally, as decisive of most if not all the contentions made under paragraph V, we hold that the terms of the answer precludes the defenses considered. Each of them was an affirmative defense, and none of them are pleaded. There is no general denial in the answer, and if there was it would not raise defenses of the character passed on. The answer is a confession and avoidance of every allegation in the petition except two, to wit, that of tender and performance by plaintiffs. Those are denied. Such denial raised no issue such as defendants now interpose. But if we are mistaken in that, and the answer be held a general denial, yet "the general denial puts in issue the facts pleaded in the petition, not the liability. The facts from which the law draws the conclusion of nonliability must be pleaded in the answer, when they are not stated in the petition." Musser v. Adler, 86 Mo., loc. cit. 449, and cases cited.

VI. Is the fact that the contract of agency was not acknowledged or recorded fatal to relief?

Learned counsel argued that way. Their argument rests on R. S. 1909, § 2816, reading: "Every letter of attorney, or other instrument containing a power to convey real estate, as agent or attorney for the owner thereof, or to execute as agent or attorney for another, any instrument in writing conveying the real estate or whereby real estate may be affected in law or equity, shall be acknowledged or proved, and certified

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and recorded, as other instruments in writing conveying or affecting real estate are required to be acknowledged or proved and certified and recorded."

The force of that section is spent in preserving or recording muniments of title. If a conveyance is (or is to be) made by the attorney in fact and his power be unacknowledged, it (the power) is not entitled to record. Left off of record, there is a link out in the record chain of title. Hence the requirement of the statute. But a deed or muniment of title may be good as between the parties without acknowledgment or record. The function of the acknowledgment is to prove its execution; without it, proof must rest aliunde. The purpose of the record is to impart notice.

The construction put on the power of attorney in this instance was not that of a "power to convey," but of a power to contract that hte principal should convey — quite another matter. Under the foregoing view, the power in the instant case does not fall within the letter or spirit of the statute quoted.

There is a statute (section 2783, R. S. 1909) in point, reading, in part: ". . . And no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make such contract." Before 1887, when the foregoing clause was enacted into law as an amendment to the statute of frauds, the rule had been that an agent's authority to make the contract need not be in writing. Riley v. Minor, 29 Mo. 439; Johnson v. Fecht, 185 Mo., loc. cit. 342, 83 S. W. 1077. Since the passage of said amendatory act, a writing (not the acknowledgment or the recording of it) has been held to subserve the purposes of the statute. Roth v. Goerger, 118 Mo. 556, 24 S. W. 176; Kirkpatrick v. Pease, 202 Mo., loc. cit. 489, 101 S. W. 651; Johnson v. Fecht, supra. The object of the section was to dispense with parol testimony to prove the agent's authority and to require that authority to be evidenced by writing. When the lawmaker desires to further amend the statute of frauds by requiring the warrant of authority to make a contract in the name of the principal (leaving it to the principal himself to make the conveyance) to be also acknowledged and recorded, it will be time enough for us to hold an acknowledgment and recording are essential to the validity of a contract of agency such as at bar. We shall not amend the statute by judicial fiat.

This point is also ruled against defendants.

We have pusued the matter far. There are other contentions; but they are either covered by rulings already made, or are without substantial merit justifying a prolongation of this opinion. For the first time in a late brief in banc, after the case had been written in division, the scope and character of the decree, nisi, are questioned. We have looked into that and find it worked out an equitable result. We find no fault with it.

The premises considered, the decree was right, and is therefore affirmed.

All concur, except WOODSON, J., who dissents.

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Decision No. 1491.

NATIONAL PARK BANK OF NEW YORK v. KOEHLER.

(Court of Appeals of New York. Jan. 16, 1912.)

97 N. W. 468.

PRINCIPAL AND SURETY.

An agreement by a creditor with the principal debtor, which extends the time of payment or suspends the right to enforce the debt without the surety's consent, discharges the surety.

A company executed its negotiable note payable to its own order and signed by defendant as accommodation indorser, which note was indorsed to plaintiff, and before it was due the company wrote to plaintiff offering to pay it at a stated time, and stating that "for the fulfilment of this engagement" it would give its new note with its president's indorsement, to which plaintiff replied by suggesting the execution of several notes instead of one "to be indorsed personally, as proposed, by" defendant, to which the company replied that its proposition was to have its president indorse the new notes, instead of defendant, who was absent, to which plaintiff replied that it preferred to have defendant indorse them, and returned the notes for his indorsement. The company suggested that plaintiff hold the old note with defendant's indorsement "as collateral until the new notes are paid," and that the indorsement of its president had been left on the notes as proposed. Plaintiff retained the notes without replying. Held, that the agreement did not reserve plaintiff's right to proceed against defendant on the old note, so that defendant was discharged; Negotiable Instruments Law (Consol. Laws 1909, c. 38 § 201, providing that one secondarily liable is discharged by any agreement by the holder to extend the time of payment or postpone his right to enforce the instrument, unless the right of recourse be expressly reserved.

The obligation of a surety such as an accommodation indorser will not be extended beyond its strict terms.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the National Park Bank of New York against Otto Koehler. From a judgment of the Appellate Division (137 App. Div. 785, 122 N. Y. Supp. 490) affirming a judgment of the Trial Term for plaintiff (65 Misc. Rep. 390, 121 N. Y. Supp. 640), defendant appeals. Reversed, and new trial ordered.

Oscar B. Bergstrom, for appellant. C. H. Payne, for respondent.

GRAY, J. The plaintiff has sued the defendant as an accommodation indorser upon a note made by the Para Recovery Company, whereby that company, four months after date, promised to pay to its own order the sum of $15,000. This note it indorsed over to the plaintiff for value, with the defendant's indorsement added to secure its credit. The defense interposed to the suit was that the defendant had been discharged, as indorser, through an extension of the time of payment of the note, prior to its maturity, without his consent, by the taking of new notes payable at future dates. At the conclusion of the trial, both parties moved for the direction of a verdict, the jurors were discharged, the court took the case under advisement, and subsequently rendered a decision in favor of the plaintiff, formulated in findings of fact and conclusions of law. The

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judgment entered thereupon has been affirmed, by a divided vote of the justices. No question has been made with respect to the procedure; the appellant stating the facts to be undisputed, and asserting that, upon those facts, the trial court erroneously concluded adversely to his defense. The facts, as found, are that, prior to the maturity of the note, the Para Company requested of the plaintiff an extension of the time of payment and its acceptance of new notes for the amount due, payable in instalments of $500 a week for eight weeks and of $1,000 a week for eleven weeks. The plaintiff agreed to extend the time of payment and to accept the new notes, provided the same should be indorsed by the defendant. It is, then, found that the maker, the Para Company, "was unable at the time to procure the indorsement of the defendant upon the new notes, . . . and in lieu thereof agreed with the plaintiff that the plaintiff should hold the old note, . . . as collateral, until the new notes, . . . each, should be paid; and that the plaintiff, in pursuance of such agreement, received said new notes . . . and continued to hold the said note for $15,000, indorsed by the defendant." As a conclusion of law, upon which judgment was directed for the plaintiff, the court found that "by the agreement entered into . . . the rights of the plaintiff against the defendant, as indorser upon the $15,000 note, were reserved, and the defendant was not discharged," etc. The agreement of the plaintiff and the Para Company, which the court has found, is evidenced in a correspondence between them and it is necessary to refer to it. Prior to the due date of the note, the Para Company wrote to the plaintiff, proposing to pay "the sum of $500 each week for eight weeks . . . the balance of $11,000 to be paid at the rate of $1,000 a week; so that in eleven weeks more the whole amount will be wiped off. For the fulfilment of this engagement, the company will give its new note with the president's personal indorsement." The plaintiff replied, acceding to the company's request, and suggesting that: "Instead of making one note for the entire amount, you draw a number of notes for $500 and $1,000 each, . . . to be indorsed personally, as proposed, by Mr. Koehler" (this defendant). A week later, the company wrote acknowledging the receipt of the plaintiff's letter and saying: "There is a little mistake in your letter as you propose to have new notes indorsed by Mr. Otto Koehler. Our proposition was that our president, Mr. G. E. Heyl-Dia, would put his personal indorsement on the new notes. . . . Mr. Koehler being absent for a period, which might extend over two or three months, Mr. Heyl-Dia has undertaken to take care of this matter." The plaintiff replied and gave its reasons for preferring the indorsement of Koehler, saying, "We therefore return the notes for the indorsement of Mr. Koehler." On the day of the maturity of the note, the company acknowledged the plaintiff's letter and said: "We do not see how it is possible to get Mr. Koehler's indorsement when Mr. Koehler is out of the country and will not return for three months or so. In the meantime, we can only assure you that we will pay the notes as they fall due, and we suggest that you hold the old note with Mr. Koehler's indorsement as collateral until the new notes are paid, as a way out of the difficulty. We have left Mr. Heyl-Dia's indorsement on the new notes, as proposed by us. The new notes, as suggested, are inclosed, and we take it that this matter is now in order." The plaintiff made no reply. The old note was protested, with due notice to the defendant. A charge of the amount of the old note to the company was entered upon the books and also a

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credit entry made of the amount of the new notes, as discounted. It appears that the defendant was not in New York at the maturity of the old note, nor during the period of the running of the new notes. The eight notes for $500 and one note for $1,000 were paid, as they matured, leaving still due the plaintiff the sum of $10,000.

The existence of the general rule is not in dispute that, if there has been an agreement by the creditor with the principal debtor, which extends the time of payment of the debt, without the consent of the surety, or indorser, the latter is discharged. That there was an agreement, in this case, between the holder and the maker of the note, is established, and what the parties intended thereby is to be ascertained by interpreting the proposition of the final letter in the light of what had preceded and of what was done thereafter. Having retained the new notes, which were inclosed in that letter, and having credited their amount to the Para Company, the plaintiff must be deemed to have assented to the proposition, accompanying their delivery, and to be bound by its legal effect as an agreement. The appellant contends that it operated in law as an agreement to extend the time of payment of the original note, and therefore to discharge him, as a nonassenting indorser. The respondent contends that the arrangement was meant, and was understood to mean, the reservation of the creditor's rights against the indorser and the retention of the rights of the latter against the principal debtor. It is claimed, in its behalf, that the agreement was conditional upon the assent of the indorser. Our Negotiable Instrument Law (section 201) formulates the existing rule of law, as follows: "A person secondarily liable on the instrument is discharged: . . . (6) By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

The question before us is vexed, not because of instability in the rule of law established for the protection of an indorser, or surety, but in the application of the rule to the facts of the case. It is a rule, long recognized, that an accommodation indorser, or surety, is entitled to have the engagement of the principal debtor preserved, without variation in its terms, and that his assent to any change therein is essential to the continuance of his obligation. The reason of the rule is that his right must not be affected, upon the maturity of the indebtedness, to make payment and, by subrogation to the creditor's place, to at once proceed against the principal debtor to enforce repayment. Therefore it is that any agreement of the creditor, which operates to extend the time of payment of the original debt and suspends the right to immediate action, is held to discharge the nonassenting indorser, or surety; as the law will presume injury to him thereby. The creditor may arrange with his debtor in any way, which does not result in effecting either of these results. He may take, as collateral to the old note, new security, or other notes, and, if time is not given to the debtor, the indorser, or surety, will not be discharged. To prevent such a result, the agreement must expressly reserve all the remedies of the creditor against the indorser, or surety; in which case the latter will be in a position to pay immediately and, then, to proceed against the principal debtor. As to the general rule, see Gahn v. Niemcewicz, 11 Wend. 312; Putnam v. Lewis, 8 Johns. 389; Taylor v. Allen, 36 Barb. 294; Myers v. Welles, 5 Hill. 463; Fellows v. Prentiss, 3 Denio, 512, 45 Am. Dec. Dec. 484; Place v. McIlvain, 38 N. Y. 96, 97

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Am. Dec. 777; Hubbard v. Gurney, 64 N. Y. 457; Morgan v. Smith, 70 N. Y. 537; Pomeroy v. Tanner, 70 N. Y. 547; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130.

In this case, the agreement does not, in terms, reserve the holder's remedies against the defendant; for the bank was to "hold the old note, with Mr. Koehler's indorsement, as collateral, until the new notes are paid." That was the agreement. It is true that the plaintiff had previously returned these notes and insisted upon having the defendant's indorsement; but how can that fact import a new term into the eventual agreement? When they were, again, sent without that indorsement, they were retained without a demur to the suggestion that the company be allowed to make payment through them and that the old note be held as collateral. What the respondent claims, under the arrangement as made, is that, under the circumstances, and with the protest of the original note, what was meant and effected was the preservation of the defendant's obligation "as it originally existed with all his rights unimpaired." So far as the protest of the old note is concerned, that fact cannot help out the agreement, if that agreement did operate to suspend the plaintiff's right of action against the maker. The fact goes to show that the plaintiff accepted the arrangement and, doubtless, supposed the defendant's liability to have been fixed and preserved. How, then, is the agreement to be interpreted? Is it not conditioned upon the defendant's consent to the arrangement, which would have left him free to proceed upon the old note by taking it up and, rejecting the new notes, to enforce repayment against the maker. Its effect was to preclude the plaintiff from maintaining any action upon the note against the maker; for the company could have objected that, under their agreement, it was to be held as collateral, until the new notes were paid. Thus the right of action was, necessarily, suspended during the interval. In Place v. McIlvain, supra, an action against the indorsers of a note, it appeared that, after the note had been protested for nonpayment, the maker wrote, inclosing his check for the amount, dated nine days later, and requesting the holder to keep it till paid, when the note would be taken up. The maker made no response retained the check, and, upon its nonpayment when due, sued the indorser upon the note. It was held that retaining the check was to be deemed an assent to the terms of the letter inclosing it, and that, under the authorities, "the plaintiffs having suspended the right to sue the maker upon the note until the maturity of the check, the indorsers were thereby discharged." Place v. McIlvain presents a case of an extremely strict application of the rule; but it has, since, been recognized as an authority upon the rights of a surety, or indorser. Hubbard v. Gurney, 64 N. Y. 457, 467; Pomeroy v. Tanner, 70 N. Y. 547, 550. In Pomeroy v. Tanner, also, an action against an accommodation indorser, after the indorsed note became due and without his consent, the plaintiffs agreed with the makers that the letter might draw time drafts on them, which should be sold, and the proceeds, covering the amount of the note, credited. It was held that there was a clear intention to extend the time for the collection of the note, and that the plaintiff's accepance and use of the drafts suspended their right of action and discharged the indorser. It was said that the makers of the drafts assumed "an original liability to the same extent as if they had given a new note or a check, and thus are brought directly within the cases which hold that the taking of a bill or draft from the debtor, payable at a future day, suspends until then the creditor's right of action, and operates as an extension of credit, by which the in-

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dorser not assenting to the transaction is discharged." Page 551. The effect of the agreement in this case was to bind the hands of the plaintiff. The new notes were to be held until their maturity, and only, then, if default in their payment occurred, was the old note to be enforced. If the new notes had been given as collateral to secure the payment of the old note, a different question would be presented. These notes were not collateral obligations; they represented the principal debt, or old note.

The difficulty is that in this arrangement there was evidenced the intention of the parties to suspend action upon the note until a future day. What could have been the purpose of giving new notes, with another's indorsement, except that it was intended to procure a definite extension of time? Had matters remained as they were, upon the debtor's default in payment, the plaintiff might have been indulgent in enforcing the note, and its remedies would not have been affected. The defendant would have been held, and it would have rested with him to stand a suit, or to pay the debt and to prosecute his remedy against the principal debtor. It was reasoned in the prevailing opinion at the Appellate Division that, considering what had occurred between the parties, this transaction between them was conditional, and that they understood that the defendant's liability as indorser was preserved. It was said that "the fair inference from the entire transaction is that the plaintiff absolutely reserved its right to proceed forthwith against the defendant, and that the extension of time was conditional upon the defendant's consent." This view, strongly presented as it is, is weakened by the necessary concession that there was an extension of time; by the absence of sufficient language in the agreement of the parties to import its dependence upon some further act, as the consent of the defendant, and by the fact that that consent was not had, nor, so far as the record discloses, previously sought. Within the rule of the authorities, as under the provisions of our negotiable instruments law, we must hold that the agreement of the parties did not distinctly, nor impliedly, reserve the right of the bank to proceed by immediate action against the defendant. Action against him, as against the maker, was suspended. In Calvo v. Davies, 73 N. Y. 217, 29 Am. Rep. 130, it was said: "When in an agreement between a creditor and the principal debtor extending the time of payment, the remedies against the surety are reserved, the agreement does not operate as an absolute but only as a qualified and conditional suspension of the right of action. The stipulation in that case is treated in effect as if it was made in express terms, subject to the consent of the surety." If the parties actually had in mind a reservation of the right of action against the defendant, if they intended that the transaction was subject to his consent, it would have been easy to have said so.

It may be assumed that the plaintiff believed these conditions to have existed, or its assent would have been refused to the arrangements; but the obligation of such an indorser, as a surety, is strictissimi juris. He was entitled to insist that, within the strict application of the rule in such cases, he was released from his obligation by an agreement of the creditor with the principal debtor, to which he had not consented, and which extended the latter's time of payment of its indebtedness.

For these reasons, the judgment should be reversed, and a new trial had; with costs to abide the event.

CULLEN, C. J., and VANN, WILLARD BARTLETT, and COLLIN, JJ., concur. HAIGHT and HISCOCK, JJ., dissent.

Judgment reversed, etc.

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Decision No. 1492.

LOUISVILLE & N. R. CO. v. CENTRAL KENTUCKY TRACTION CO. et al.

(Court of Appeals of Kentucky, March 13, 1912.)

144 So. W. 740.

CORPORATIONS — STREET RAILROADS — EASEMENTS — STATUTES — GRANTS — MONEY PAID — WORK AND LABOR.

Where an officer of a street railway company which purchased the right of way of an insolvent company was also an officer of the insolvent company, his knowledge as to the rights of a railroad company in a crossing was attributable to the purchaser.

A commissioner's deed on foreclosure sale of the property of a street railroad company, which covers the company's right of way, equipment, privileges, rights, appendages, and appurtenances, will include an easement of right of way over the tracks of a steam railroad company under a contract between the latter and the mortgagor, though not specifically mentioned.

A purchaser on foreclosure of the property of a street railway company having knowledge of the rights of a railway company in a crossing over its property takes no greater right than the street railroad company.

Where one corporation goes entirely out of existence by being merged into another, the surviving corporation is entitled to all the properties and answerable for all the liabilities of the other, and so, where a street railway corporation, entitled to a crossing over a railroad company is merged into another, the survivor takes it subject to all liabilities.

A street railway corporation which desired a crossing over a railroad entered into a contract with the railroad securing it. The street railway company then became insolvent and a new company purchased its assets, being given a new franchise by the municipality in which it operated. Held that, despite the new franchise, its rights were fixed by the original contract under which it succeeded to the crossing.

Where a railroad company granted a street railway company the right to build a crossing over its tracks, and the contract provided that the street railway company might make any additional crossings that might become necessary in consequence of additional tracks being laid by the railroad company, the additional crossings were those over any new tracks which the railroad company might lay in future years, and were not limited to additional tracks located before the crossing was made.

One who voluntarily pays the debt of another, or expends money on another's account without his consent, cannot recover, for no man can of his own volition make another his debtor.

A railroad company granted a street railway company the right to make a crossing over its tracks on condition that the street railway company should establish any new crossings that might be necessary by reason of the railroad company's laying additional tracks. The contract provided, further, that the railroad company might at the street railway's expense furnish the necessary labor and material to put the crossings in order, if the street railway company failed to do so. The railroad company upon changing the grade of its tracks repaired the crossing after the street railway's refusal. Held, that the railroad company, having repaired the crossing, might recover from the street railway company, for the contract gave it that right, and the duty to repair it was imperative, both companies being common carriers bound to operate their trains.

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Appeal from Circuit Court, Franklin County.

Action by the Louisville & Nashville Railroad Company against the Central Kentucky Traction Company and another. From a judgment for defendants, plaintiff appeals. Reversed.

McQuown & Beckham, for appellant. Hazelrigg & Hazelrigg, for appellees.

WINN, J. On July 25, 1893, the appellant railroad company and the Capital Railway Company entered into the following contracts:

"Whereas, the Capital Railway Company of Frankfort wishes to cross with its street car railway the main track of the Louisville & Nashville Railroad at Ann street, in the city of Frankfort, Ky.; and

"Whereas, the Louisville & Nashville Railroad Company has consented that said Capital Railway Company may make said crossing upon the terms and conditions set forth herein, to wit:

"Now, therefore, this contract, made and entered into this 25th day of July, 1893, by and between the Capital Railway Company of Frankfort, Ky., and the Louisville & Nashville Railroad Company, witnesseth: That the said Louisville & Nashville Railroad Company consents that said Capital Railway Company may make said proposed crossing and any additional crossing that may become necessary in consequence of any additional track or tracks that may be put down by said Louisville & Nashville Railroad Company, parallel with its present track, but said crossings are to be constructed by the Capital Railway Company at its own expense, and without expense, damage or injury to the said the Louisville & Nashville Railroad Company, or its property whatever, and are to be constructed in such a manner and are to be of such character, as to make the rails of said the Louisville & Nashville Railroad Company continuous over the crossings; and this permission is given upon the express condition that said Capital Railway Company is to construct and maintain said crossings free of expense to said the Louisville & Nashville Railroad Company; and in the event the said Capital Railway Company shall at any time fail or refuse to maintain said crossings at its own expense, as herein provided for, then, and in that event, said the Louisville & Nashville Railroad Company may take up and remove all such crossings as the said Capital Railway Company, its successors or assigns, may have put down or constructed, or the Louisville & Nashville Railroad Company may, if it chose to do so, furnish the necessary labor and material and repair and put in order said crossings at the expense of said Capital Railway Company, its successors or assigns, and the Capital Railway Company hereby agrees that it, its successors or assigns, shall pay the actual cost thereof.

"And this permission is given upon the further condition that the trains of said the Louisville & Nashville Railroad Company shall have precedence over the crossings. Said Capital Railway Company hereby agrees that all of its cars shall be stopped before passing over the crossings, and its motorman, drivers, conductors, or other employees, shall see that the track is clear before crossing.

"And said Capital Railway Company shall be liable for all damages to people or of property by reason of the failure of its employees to stop its cars, and see that the track is clear before passing over the crossings.

"It is further agreed that, if any overhead wires are erected by or for the said Capital Railway Company, such wires shall be at least twenty-

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two (22) feet above the top of the rail or tracks of said the Louisville & Nashville Railroad Company.

"All such crossings shall be made according to plans submitted to, and approved by, the chief engineer of the Louisville & Nashville Railroad Company.

"The Louisville & Nashville Railroad Company hereby expressly reserves the right at any time to lay such additional track or tracks parallel with its present tracks, or approximately parallel thereto, where the same is hereby authorized to be crossed by the said Capital Railway Company, as it may from time to time deem necessary.

"Witness the signature of the parties the date and year first herein written. Capital Railway Company, by Pat McDonald, President. The Louisville & Nashville Railroad Co., by J. C. Metcalfe, General Manager."

It appears that there was at the time only one track of the appellant company at the point of intersection named in the contract. It further appears that the railroad company, having built a new passenger station in Frankfort, found it necessary to lay an additional parallel track, and to grade and reconstruct the track, named above. It thereupon presented the contract of 1893 to the appellees, and requested them to cause the crossings over the two tracks to be built at the expense of the appellees. Upon the failure by the appellees to construct them, the railroad company built them, and brought its action to recover the cost. By consent of the parties the action was transferred to equity. Upon a submission the petition was dismissed, and the Louisville & Nashville Company appeals.

Several questions are presented by the record. The first one is whether the appellee companies are bound by the original contract made with the Capital Railway Company. Its answer demands an examination of the connection or derivative relation of the companies. It appears that the Capital Railway Company, under the contract, supra, bore the cost of the crossing put down about the time the contract was made. Mr. John T. Buckley was the general manager of the Capital Railway Company. He testified that his company was to put in and keep up the crossing. In 1894 the Capital Traction Company went into a receiver's hands, and was operated by him for a time. It was sold under foreclosure proceedings in the United States Circuit Court, and conveyed by its commissioner, by deed of date June 23, 1898, to a corporation known as the Frankfort & Suburban Railway Company.

Of this concern Mr. Buckley was also general manager, as well as its secretary and treasurer. Among the properties conveyed by the deed were the old company's rights of way, equipment, privileges, rights, appendages, and appurtenances. No mention was made of the contract supra; but Mr. Buckley was the general manager of both companies; and as to the rights of third parties his knowledge was the knowledge of the purchasing company. The contract right owned by the Capital Railway Company to operate its line across the Louisville & Nashville track passed by the deed named, although there was no specific mention of it in the deed. Hammonds v. Eads, 146 Ky. 162, 142 S. W. 379; Conly v. Fairchild, 142 Ky. 271, 134 S. W. 142. And, since it had knowledge of the terms under which the right arose, it was bound to exercise the right, if exercised at all, under the obligations imposed by that contract. Having knowledge of the obligation imposed by that contract, it should in good

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conscience use no right gained under it, save by performing its obligation. So far, then, the Frankfort & Suburban Railway Company stood in the shoes of the Capital Railway Company. The Frankfort & Suburban Company operated until December, 1902, when it failed. It shut down operations, and its tracks were covered over by the city of Frankfort with macadam. The crossing was taken up by the railroad company. In 1903 the Frankfort & Versailles Traction Company was organized. Mr. Buckley was a stockholder, secretary, and, a little later, general manager of the new company. On December 28, 1903, the Frankfort & Suburban Company conveyed its properties to the new company. The deed conveyed "the entire holdings of real and personal property, corporate and incorporate, tangible and intangible, franchises, rights of way and all species and estates of every kind and description," which, of course, included the right to cross the railroad track. And, again, since through its manager the new company had knowledge of the obligation imposed as a condition to the right, it, using the right, had to perform the obligation. But there is a stronger factor against it. On December 13, 1903, the Frankfort & Versailles Company, through Mr. Buckley, wrote the appellant, desiring that a new crossing be put in at the traction company's expense. On December 21st the railroad superintendent replied, and among other things said: "I also send you a copy of the contract between this company and the Capital Railway Company, dated July 25, 1893." In one of his letters about the matter Mr. Buckley wrote that at the time of the removal he asked that the crossing be left alone, "as our company was about to change hands." Following this correspondence, and the receipt of the copy of the contract, the new crossing was put in in March, 1904. Certainly the contract was sent to it as a part of the understanding about the putting in of the new crossing; and when Mr. Buckley, for both companies, had had the matter in charge and in mind, the new company in using the rights must be held to owe the obligation. That it so recognized it is evident from the fact that it paid the expense of installing this crossing.

The Central Kentucky Traction Company, the appellee, later, by merger, took over the property of the Frankfort & Versailles Traction Company at least in an amended petition filed upon September 20, 1909. It was charged that the Central Kentucky Company had acquired a right, title, and interest in and to the property of the Frankfort & Versailles Company, and that both of said companies were the successors and assigns of the Capital Railway Company and the Frankfort & Suburban Railway Company. The relationship of the two corporations was not denied in the reply. The principal defense was made by the Central Kentucky Traction Company; the Frankfort & Versailles Company having filed its answer in which it set up that it had no real interest in the controversy, was operating no railroad, and was no longer a going concern. There is in the record, marked "Tendered," a copy of the agreement, properly authenticated, whereby the Frankfort & Versailles Company was merged into the Central Kentucky Company, but the order tendering it shows that the court took time to consider it; and the case proceeded to judgment without any further order in respect to it. We are of opinion, however, that the pleadings sufficiently admit the merger. The Central Kentucky Traction Company became liable thereby for all the liabilities and contract obligations of the Frankfort & Versailles Company. "Where one corporation goes entirely out of existence by being annexed to or

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merged into another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the surviving corporation will be entitled to all the properties and answerable for all the liabilities of the other. The liabilities of the old corporation are enforceable against the new one in the same way as if no change had been made." Thompson on Corporations, § 372. The text is adopted in Louisville & Nashville Railroad Co. v. Biddell, 112 Ky. 494, 66 S. W. 34, 23 Ky. Law Rep. 1702.

From the foregoing it will be seen that, in so far as the rights and obligations under the original contract are concerned, the Central Kentucky Traction Company is as much entitled to enjoy the rights as was the original Capital Railway Company; and it just as much owes the duty to discharge the other side of that contract as did the Capital Railway Company.

This position is not in the least affected by the fact that a new franchise was granted by the city of Frankfort in 1903 to the Frankfort & Versailles Traction Company; for, while a franchise was necessary to permit any one of the sundry companies to operate a street railway system in Frankfort, that franchise has naught to do with the contract rights and contract obligations imposed under the contract before us. The Capital Railway Company in the beginning saw fit to make it a matter of contract with the Louisville & Nashville Road, rather than to exercise any legal effort to force the right. Having made it a matter of contract, it and its successors and assigns are bound by it.

It remains to be seen whether the contract itself applies to the two crossings which were put down after the building of the new station. The contract is not as clear as it might be. Its preamble recites that the Capital Company desired to cross the main track of the Louisville & Nashville Road at the intersection named; that the Louisville & Nashville Road had consented that said crossing might be made. The body of the contract then recites that the consent is given to make said crossing, and any additional crossings that might become necessary in consequence of additional railroad tracks on condition that said crossings were to be constructed by the Capital Company at its own expense, and upon the further condition that the Capital Company was to construct and maintain such crossings free of expense to the Louisville & Nashville Company. It is argued by appellees that the additional crossings then contemplated were to be such crossings as might be over any additional tracks laid by the Louisville & Nashville Company before any original crossing work was done. The railroad company, on the other hand, argues that the intention of the contract was to embrace their construction at the expense of the Capital Company or its successors, over such additional track or tracks as might be laid down by the railroad company in future years. No light is thrown upon this matter of construction by any testimony in the record. We do find, however, a strong argument in the surrounding circumstances and facts existing at the time. It was recognized by the parties that the contract contemplated an immediate construction of a crossing as the line of the Louisville & Nashville Road then existed. As a matter of fact, the contract was made in the latter part of July, 1893, and the crossing named was made some time later in that year. Had it been in contemplation of the parties that additional tracks were to be built by the railroad company during that year, some recital of such purpose doubtless would have appeared in the contract. The railroad com-

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pany reserved to itself the right at any time to lay additional tracks whenever it from time to time might deem them necessary. It seems clear from these provisions in the contract and from the surrounding circumstances that the additional crossings named in the contract contemplated crossings over such additional tracks as the railroad company might construct through the future years.

It is further argued for appelles that the contract gave no right to the railroad company to do the original construction of such crossings, with the consequent right to look to the street railway company for the cost; and that the provision in the contract, whereby the railroad company might do the work itself, extended only to the maintenance, repairing, and putting in order of the crossings. The petition, however, alleges that the railroad company after it had put in the new track and changed the grade of the old one presented the contract of 1893 to the appellees, and requested them to cause the crossings to be made at their own expense, but that they failed and refused so to do; and that thereupon the plaintiff provided the material and labor, and constructed the crossings. The fact that the request was made and the contract presented is not denied. As a general proposition, one who voluntarily pays for another a debt or obligation owed by the other, without the request of that other, or who expends money on account of another, without the consent of that other, cannot recover the money laid out; and this upon the principle that no man can of his own volition make another his debtor. We do not think this case comes within that rule. The railroad company was bound to continue to operate its trains as a common carrier across this intersection. It realized that the traction company as well, as a common carrier, was operating its cars across the intersection. The railroad company knew that within reason it could not so alter the physical condition of the properties at the point of intersection as to stop the safe and prudent operation of both lines at this point. It therefore had to act promptly. The traction company, owing to the correlative duty, declined to act. Nor do we think that the narrow construction put upon the contract by the appellees in this aspect is correct. The right of the railroad company to furnish the necessary labor and material and to put in order the crossings at the expense of the street railway company, its successors or assigns, as provided in the contract, is given to it when the street railway company should fail or refuse to maintain the crossings at its own expense; and its failure to put in the new crossings when the conditions arose demanding them was a failure upon the part of the street railway company to maintain the existing condition of a crossing there.

For the reasons given the judgment of the trial court is reversed, with directions to enter judgment in favor of the appellant against the Central Kentucky Traction Company for the sum of $548.65, with interest from the time of the filing of the petition.

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Decision No. 1493.

CASHIN et al. v. PLITER.

(Supreme Court of Michigan. Feb. 10, 1912.)

134 N. W. 482.

CONTRACTS — NAMES — IMPLIED CONTRACTS — WORK AND LABOR.

Contracts in violation of statutes, enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, which contain a prohibition and impose a penalty, are void.

Pub. Laws (Mich.) 1907, No. 101, prohibiting the transaction of business under an assumed name, or any other than the real name of the individual conducting the same, unless such person shall file with the county clerk a certificate, setting forth the name under which the business is to be conducted, and the real name of each of the owners, with their residences and post office addresses, and making a violation a misdemeanor, is a proper exercise of the police power to protect the public from imposition and fraud.

Pub. Laws (Mich.) 1907, No. 101, prohibiting the carrying on of business under an assumed name, unless a certificate is filed setting forth the real name, residence, and address of each of its owners, and declaring a violation thereof a misdemeanor, renders contracts made in violation of it unenforceable at the instance of the offending party only, but not as to parties who have dealt with the offenders in ignorance of their violation of the statute.

Where there is an express agreement covering the subject-matter, the law will not imply an agreement.

A party who has performed labor and furnished materials in the construction of a house under an express contract, unenforceable by such party by reason of Pub. Laws (Mich.) 1907, No. 101, prohibiting the doing of business under an assumed name, cannot recover therefor under the common counts or upon an implied agreement, since the statute recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff.

Error to Circuit Court, Genesee County; Charles H. Wisner, Judge.

Action by McArthur Cashin and another, copartners, doing business under the firm name of Flint Construction & Realty Company, against William G. Pliter. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before MOORE, C. J., and STEERE, BROOKE, STONE, and OSTRANDER, JJ.

Farley & Selby (William V. Smith, of counsel), for appellant. Clifford A. Bishop, for appellee.

STEERE, J. In this case a verdict was directed in favor of defendant, for the reason that the contract sued upon was void under Act 101 of the Session Laws of 1907; the same being entitled "An Act to regulate the carrying on of business under an assumed or fictitious name."

This act prohibits the conduct or transaction of any business in this State under an assumed name, or any other than the real name of each individual owning or conducting the same, unless such person or persons shall acknowledge and file in the office of the clerk of the county in which the business is or is to be conducted, or an office maintained, a certificate

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setting forth the name under which such business is or is to be conducted, and setting forth the real name of each of the owners of such business, together with the residence and post office address of each of said owners. A copy of such certificate is made evidence of the facts therein contained in courts of law in this State. Violation of the requirements of this act is declared a misdemeanor, punishable by fine and imprisonment.

The declaration alleges in the first count that plaintiffs are a copartnership, doing business under the firm name of Flint Construction & Realty Company; that on March 14, 1910, plaintiffs, "under the firm name of Flint Construction & Realty Company," entered into a written contract with defendant to build him a house in the city of Flint for the sum of $825; that the same is fully performed and the house finished; that there is a balance due on said contract which defendant refuses to pay. A copy of said contract is attached to and made a part of the declaration. The declaration also contains the common counts. Defendant's plea was the general issue.

At the trial plaintiffs proved that they were engaged in the building and contracting business in the city of Flint in 1910, with offices in the National Bank building in that city, doing business as copartners under the name of the Flint Construction & Realty Company; that as such copartners, and under such name, they entered into a certain contract, in writing, with defendant to build a house for him. The contract was identified and offered in evidence. No proof was made or offered that plaintiffs had complied with the requirements of said Act 101. The contract was objected to, and timely objection was also made to all other evidence offered in support of the allegations in the declaration, on the ground that plaintiffs had not complied with the requirements of said act, and had been transacting business in violation thereof; that any contract so made under an assumed name was illegal and not enforceable. The objections were sustained. The court also held that plaintiffs were not entitled to recover under the common counts for labor and material furnished in the construction of said building, and, after parties had rested, directed a verdict as stated. Plaintiffs made a motion for a new trial, which was denied.

The points presented on the motion for a new trial, and upon which error is assigned, are substantially the same as those urged and argued during the trial of the cause. Briefly stated they are: That said Act 101 is a penal act, not implying or intending any other punishment or loss to those violating it than that expressly provided by fine and imprisonment; that the act has no application in a case where defendant knows who comprise the members of the concern with which he deals, he being estopped by such knowledge; that, even if the contract be void, inasmuch as the same is fully performed, and defendant has benefited thereby, plaintiffs are entitled to recover, under the common counts, the reasonable value of material furnished and labor performed; and that said act is unconstitutional under section 21, art. 5, of the Constitution of this State.

The last objection is not discussed in appellant's brief, but is presented in the record. The one object of the act is manifestly to protect the public against imposition and fraud, prohibiting persons from concealing their identity by doing business under an assumed name, making it unlawful to use other than their real names in transacting business without a public record of who they are, available for use in courts, and to punish those who violate the prohibition.

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The object of this act is not limited to facilitating the collection of debts, or the protection of those giving credit to persons doing business under an assumed name. It is not unilateral in its application. It applies to debtor and creditor, contractor and contractee, alike. Parties doing business with those acting under an assumed name, whether they buy or sell, have a right, under the law, to know who they are, and who to hold responsible, in case the question of damages for failure to perform or breach of warranty should arise.

The general rule is well settled that, where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and impose a penalty, all contracts in violation thereof are void. Pollock's Principles of Contract, 293; Drury v. Defontain, 1 Taunt. 136; Meyers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Lyons v. Armstrong, 6 Ver. 219; Harris v. Runnels, 12 How. 79, 13 L. Ed. 901; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759, and cases cited. This rule has been recognized and adopted in Shattuck v. Watson, 164 Mich. 167, 129 N. W. 196, wherein the following language is used: "It is a well-settled principle of law that all contracts which are founded on an act prohibited by statute under penalty are void, although not expressly declared to be."

It is urged that the Shattuck Case can be distinguished from the one at bar in the particular that the former is directly aimed at a contract which the law prohibits in the interest of public health and safety, the decision being founded on public poilcy, to protect citizens against unlicensed and unskilled pharmacists and resultant hazard to human life. It is true that the object of the act in question is not to safeguard human life or health; but both laws are founded on public policy. They are acts of the same class, coming within the police power of the State; one being to protect the public health, and the other to protect the public from imposition and fraud. Each prohibits certain acts, and each makes the violation a criminal offense punishable by fine and imprisonment.

In interpreting the statute under consideration, it can be contended with reason, and in harmony with former decisions of this court construing acts somewhat analogous, we are inclined to the view that it is not the intent to render a contract made in violation of this act absolutely null and void for every purpose. While, as heretofore stated, the general rule is well settled that a contract made in violation of a statute is void when the statute is otherwise silent, and contains nothing from which the contrary is to be inferred, nevertheless the diversity of legislation gives rise to varying exceptions to this rule; and before applying it in full the court should carefully scrutinize the particular statute under advisement, for the purpose of ascertaining, from the subject-matter and language used, the object for which it was enacted and the intent of its makers, to the end that such intent may be rendered effectual and the indicated purpose accomplished. As this act involves purely business transactions, and affects only money interests, we think it should be construed as rendering contracts made in violation of it unlawful and unenforceable at the instance of the offending party only, but not as designed to take away the rights of innocent parties who may have dealt with the offenders in ignorance of their having violated the statute.

In behalf of the plaintiffs, it is urged that, the contract having been performed and labor and material having been furnished, of which de-

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fendant retains the benefit, recovery can be had therefor under the common counts, on an implied promise to pay for the same what they are reasonably worth. But they were furnished under an illegal express contract, by virtue of which there can be no recovery. It is an elementary rule that, where there is an express agreement between parties covering the subject-matter, the law will not imply one. If we say that, the contract declared on being unenforceable, there was, as a matter of law, no contract, and so seek to imply one for the labor and materials furnished, then the implied contract, under the allegations of the declaration and proof offered, is not relieved of the infirmity; for plaintiffs furnished the labor and material and transacted the business under an assumed name in violation of law. Changing the name or form of pleading does not change the character of the illegal transaction; under whatever guise the claim is presented, its groundwork is a violation of the act. In such a case, the doctrine of estoppel cannot be invoked by the plaintiff; but the law leaves the parties where it finds them and refuses relief. It recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff. See Webster v. Sanborn, 47 Me. 471; Pangburn v. Westlake, 36 Iowa, 548; Jameson v. Carpenter, 68 N. H. 62, 63, 36 Atl. 554; Chattanooga National Building & Loan Association v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; 9 Cyc. 446, and numerous cases there cited.

We are constrained to hold that the contract sued upon was illegal and unenforceable as to plaintiffs for the reasons above stated. The trial court correctly held that no recovery could be had under the special count or common counts of the declaration and the proof offered in that connection.

The judgment is affirmed.

Decision No. 1494.

BROWN v. SIMSBORO CASH STORE.

(Supreme Court of Arkansas. March 4, 1912.)

144 S. W. 928.

SALES.

The passing of title to an article sold ordinarily depends upon the actual intention of the parties; and if they intend to pass title an actual change of possession of the goods is not essential to invest the buyer with title.

If there is a valid unconditional sale, with an understanding by both parties that the title to the property, which is then present, shall pass to the buyer, the sale is complete, though the seller retains actual possession of the property as bailee of the buyer.

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Action by the Simsboro Cash Store against Henry Brown. From a judgment for plaintiff, defendant appeals. Affirmed.

D. L. King, for appellant.

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FRAUENTHAL, J. This is an action of replevin for the recovery of a yoke of oxen. It was instituted by the appellee, and the trial resulted in a verdict in its favor.

The appellant has made no abstract of the instructions given by the trial court, nor of any that it refused. According to the repeated rulings of this court, we will therefore indulge the presumption that no error was committed by the trial court in its rulings upon the instructions.

The sole question which is presented by the record for our determination is whether there is sufficient legal evidence to sustain the verdict which was returned.

The appellee claimed title to the property by virtue of an alleged purchase from appellant. The appellee is a corporation engaged in the mercantile business at Simsboro, La., and it appears from the testimony introduced upon its behalf that appellant purchased goods from it for several months prior to April, 1911, and upon a credit. In April, 1911, it insisted that appellant should pay or reduce this indebtedness. In consideration of $70, which was credited by the appellee upon his account, the appellant then sold to it the property involved in this suit. The oxen were at that time in the town of Simsboro, and appellant brought them to appellee's store and turned them over for the above consideration. It was then agreed between the parties that appellant might retain possession of the property until June following, for the purpose of hauling some ties. This the appellant did; but, instead of returning the property to appellee, he left Simsboro with it in June, and there was some testimony tending to prove that he left in the nighttime, driving the cattle, and under suspicious circumstances, indicating that he was endeavoring to leave with the property without appellee's knowledge.

In determining whether or not there was a completed sale of the property to appellee under the facts of this case, the controlling question is, was there a delivery of it at the time of the alleged sale? As between vendor and vendee of personal property, the passing of the title is ordinarily determined by a consideration of what was the actual intention of the parties. As between purchaser and seller, it is not necessary that there should be an actual change of the possession of the thing sold, in order to invest the buyer with the title if such is the actual intention of the parties. Priest v. Hodges, 90 Ark. 131, 118 S. W. 253; Guion Mercantile Co. v. Campbell, 91 Ark. 240, 121 S. W. 164.

If the property is present, and the vendor, for an agreed consideration, then makes an unconditional sale of the property to the vendee, who, for an agreed price, accepts it, and at the time it is understood by both parties that the title to the property shall pass, then, although the actual possession of the property is still retained by the vendor as bailee for the vendee, the sale will still be complete. Under such circumstances, the contract of sale is absolute and binding, and the vendee's title will be protected, even as against attaching creditors or subsequent purchasers, if no element of fraud is connected with such contract of sale. Shaul v. Harrington, 54 Ark. 305, 15 S. W. 835; Hight v. Harris, 56 Ark. 98, 19 S. W. 235. We are of the opinion that there was sufficient evidence adduced upon the trial of this case showing that the property was purchased unconditionally by appellee at the price of $70, which was credited by appellee upon appellant's account to it, and that legal delivery of the property was made at the time, and actual possession thereof was only retained by appellant as bailee of the appellee. Under these circumstances, the sale was complete, and the title to the property passed to appellee.

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The appellant also urges that errors were committed by the trial court in its rulings relative to the introduction of certain testimony. Some of the exceptions which were made to these rulings have not been incorporated in the motion for new trial, and on this account have not been sufficiently preserved to be considered upon an appeal to this court. We have examined those rulings made by the trial court, relative to the introduction of testimony to which exceptions have been properly made and preserved, and we do not find that any error was committed in any of these rulings; nor do we think that they are of sufficient importance to here discuss them. The controlling question which was involved in this case is one of fact, which has been settled by the verdict of the jury.

The judgment is accordingly affirmed.

Decision No. 1495.

HALLET & DAVIS PIANO CO. v. STARR PIANO CO.

(Supreme Court of Ohio. Dec. 12, 1911.)

97 N. E. 377.

SALES — DELIVERY.

Between the parties to a sale of specific goods, especially where the price has been paid, a presumption arises that the title has passed, without a delivery of the goods.

Such a presumption does not ordinarily arise as against creditors or innocent purchasers from the vendor; but as to such third parties there must be not only a formal delivery to the vendee claiming the goods, but there must be an actual and visible change of possession.

Where a commercial transaction, which should ordinarily be completed promptly, is not completed within four months, and neither party has done anything within that time to complete the same, either party may treat the contract as rescinded.

Error to Circuit Court, Cuyahoga County.

Action by the Starr Piano Company against the Hallet & Davis Piano Company. Judgment for plaintiff, and defendant brings error. Reversed, and judgment for plaintiff in error.

H. W. Bell and Wm. Howell, for plaintiff in error. Sterling Parks and W. H. McMorris, for defendant in error.

DAVIS, J. The defendant in error entered into an agreement with one Blanche English for the sale and purchase of a piano. The memorandum of the agreement, which was signed by Miss English, did not state when or where the piano was to be delivered, nor when or how payment should be made, except "$——— allowed for Harvard piano." At the same time, the purchaser gave to the defendant in error a paper, transferring her full right to ownership of one Harvard piano, "with the understanding that said Harvard piano is to be sold by the said Starr Piano Company and full amount received by them to be placed to my credit as part payment on one Starr piano, which I am this day ordering from said Starr Piano Company." The agreement was entered into at Canton, Ohio; but the Harvard piano was at the house of a person in Alliance, Ohio. There was some talk between the parties about a written order for delivery of

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the Harvard piano to the defendant in error, but, in the language of the salesman of the defendant in error: "That part of the order was never completed. It was taken for granted that everything was satisfactory. She told me she would notify these people of the transaction, and that we could get the piano when we liked." The piano, which was agreed to be sold by the defendant in error, was never delivered to the purchaser nor tendered to her; nor did the defendant ever take possession of the Harvard piano, or sell it and credit the proceeds on the purchase money for the other piano. More than four months after the defendant in error and Miss English entered into this agreement, the plaintiff in error, without knowledge of the preceding facts, sold to her a piano, and agreed to receive, and did thereupon take into its possession, the Harvard piano as part payment on the piano then sold to her. Within a short time thereafter, the defendant in error brought suit against the plaintiff in error, before a justice of the peace, claiming to be the owner of and entitled to the possession of the Harvard piano, and charging the plaintiff in error with unlawfully converting the same to its own use, and prayed for a judgment. On appeal, the Court of Common Pleas gave judgment for the defendant in error, and the Circuit Court affirmed the judgment of the Court of Common Pleas.

The question here is whether the transaction between the defendant in error and Blanche English was a completed sale, so as to invest the defendant in error with the title to the Harvard piano.

The words, "I hereby transfer my full right of ownership of one Harvard piano . . . to the Starr Piano Company," would not be conclusive of the title in the defendant in error, even if they were unqualified, because their effect must be determined by the intention of the parties, as disclosed by a consideration of all the facts and circumstances of the transaction. But this language is distinctly narrowed by that which follows; that is: "With the understanding that said Harvard piano is to be sold by the said Starr Piano Company and full amount received by them to be placed to my credit as part payment on one Starr piano, which I am this day ordering from the said Starr Piano Company." Two things clearly appear from this document, when it is all read together: First, the Starr Piano Company was not invested with an absolute title to the Harvard piano, but with only a special interest, for the purpose of sale and the credit of the proceeds as part payment on the purchase of a Starr piano; and, second, that the transfer of the Harvard piano was only an incident in the principal transaction, which was the agreement for sale and purchase of a Starr piano. If in such an agreement there is no mention of the terms of payment, the presumption is that it is a cash sale, and that delivery of the goods and the payment of the price are to be simultaneous. If, therefore, the Harvard piano, in this case, was in fact turned over to the defendant in error as part payment for the Starr piano, in expectation that the latter would be delivered, which was never done nor offered to be done, the title claimed and possession by the defendant in error would be null and void, as obtained without consideration. That conclusion is a corollary to the propositions decided in Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527.

It may be conceded that as between the parties, where there has been a sale of specific goods, and especially where the price has been paid, the title will pass without a delivery of the goods. This, however, is only a

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presumption, and it does not ordinarily obtain as against creditors and innocent purchasers from the vendor. As to such third parties, it is the general holding that there must be not only a delivery to the vendee claiming the goods, but there must be an actual and visible change of possession. 35 Cyc. 304.

Tested by this rule, the defendant in error has no standing in court. It is not claimed that the defendant in error ever had actual possession of the piano in dispute, nor that there was ever any actual or visible change of possession until the plaintiff in error took possession of the piano and removed it to its warerooms at Cleveland; nor does it appear that the plaintiff in error had any previous notice of the transactions upon which the defendant in error claims title.

We have already intimated that this could not be regarded as a completed sale, passing the title to the Harvard piano, so long as anything in the contemplation of the parties remained to be done to complete the sale. This was, in effect, the holding of this court in Bonham v. Hamilton, 66 Ohio St. 82, 63 N. E. 597. And see Benjamin on Sales, as quoted in that opinion. The Harvard piano could not be regarded as part payment for a Starr piano, which was never delivered nor tendered to the purchaser; and, before the sale and purchase which was negotiated could be complete, the defendant in error must take possession of the Harvard piano and sell it, and credit the proceeds as payment pro tanto for the Starr piano, and the latter be delivered. This was clearly the intention of the parties. To hold otherwise would be to hold that the defendant in error could obtain a clear and lawful title to the property without any consideration passing.

Regarding the case from another point of view, it is equally obvious that the plaintiff in error must prevail. There was no time mentioned for performance. The law would so construe the contract that it should be performed in a reasonable time. This was a commercial transaction, which should ordinarily be completed with considerable promptness. When more than four months had elapsed, and neither party had done anything to complete the transaction, Blanche English had the irght to treat the contract as rescinded, and to enter into the deal with the plaintiff in error. "Mutual delinquency gives rise to the presumption of mutual assent to a rescission. See Parsons, Contracts, 667 et seq., and [Lewis v. White] 16 Ohio St. 454." Per Brinkerhoff, J., in Mowry v. Kirk & Cheever, 19 Ohio St. 375, 383; Lewis v. White, 16 Ohio St. 444, 454.

The judgment of the Circuit Court and that of the Court of Common Pleas are reversed, and judgment for plaintiff in error.

SPEAR, C. J., and SHAUCK, PRICE, JOHNSON, and DONAHUE, JJ., concur.

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FIRST-CLASS MATTER (Letters, etc.)	2c. an oz.
SECOND-CLASS (Newspapers and Periodicals)	1c. for 4 oz.
THIRD-CLASS (Books, Circulars)	1c. for 2 oz.
FOURTH-CLASS (Merchandise)	1c. an oz.
REGISTRATION FEE (additional postage)	10c
IMMEDIATE DELIVERY STAMP (additional to regular postage)	10c
MONEY ORDER ($1 to $100)	3c. to 30c.

(See below for Explanations and Exceptions.)

FIRST-CLASS MATTER.—Letters and all other written matter (whether sealed or not), excepting manuscript copy accompanying proof-sheets, also all matter sealed (see below), 2 cents an ounce, excepting drop letters at NON-CARRIER offices, 1 cent an ounce. (Postal cards 1 cent each.)

SECOND-CLASS.—Newspapers and periodicals published quarterly and oftener and not for gratuitous distribution. The general public pay by affixing stamps at the rate of 1 cent for each 4 ounces or part thereof when not sealed.

THIRD-CLASS.—Books (printed, not blank), circulars, other printed matter proof-sheets and manuscript copy accompanying the same, valentines, sheet music, heliotypes, chromos, posters, lithographs and printed advertising matter in general, all, when not sealed, 1 cent for two ounces or fraction.

FOURTH-CLASS.—Merchandise and samples, including printed matter in quantity, blank books and paper, ores, all matter not included in any of the other classes, and not in its nature perishable or liable to injure the contents of the mails, (By express ruling the postage on seeds, cuttings, roots, scions and plants is at the rate of 1 cent for each 2 ounces.) All, when not sealed, and not exceeding 4 pounds in weight, 1 cent an ounce or fraction.

SEALING.—Any matter is regarded as sealed when it is not so wrapped as to allow of a thorough examination without in any way injuring the wrapping.

REGISTRATION.—First, third and fourth-class matter may be registered at any post-office by affixing 8 cents in stamps in addition to the regular postage.

MONEY ORDER RATES.—Sums not exceeding $2.50	3c.
Over $ 2.50 and not exceeding $ 5.00	5c.
Over $ 5.00 and not exceeding $ 10.00	8c.
Over $10.00 and not exceeding $ 20.00	10c.
Over $20.00 and not exceeding $ 30.00	12c.
Over $30.00 and not exceeding $ 40.00	15c.
Over $40.00 and not exceeding $ 50.00	18c.
Over $50.00 and not exceeding $ 60.00	20c.
Over $60.00 and not exceeding $ 75.00	25c.
Over $75.00 and not exceeding $100.00	30c.

POSTAGE TO CANADA AND MEXICO.—Same as domestic rates, excepting fourth-class matter, to the amount of 4 pounds 6 ounces, with the exception of liquids, pastes, confections and fatty substances, and publications which violate the copyright law. To Canada and Mexico (except sealed packages and liquids), Com. papers to both countries at usual rates.

FOREIGN POSTAGE.

All countries are included in the POSTAL UNION, to which the rates are as follows: Letters, per half ounce, 5 cents; second and third-class matter, per 2 ounces, 1 cent; postal cards, 2 cents each.

Letters for England, Ireland, Scotland, and Wales, per ounce 2 cents and letters for Germany by steamers sailing for Germany direct, per ounce 2 cents.

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GRACE AND STATUTES OF LIMITATIONS.

STATES AND TERRITORIES.	Notes. Bills.	Sight Drafts.	Open Accounts.	Notes and Contracts.	Judgments
			Years.	Years.	Years.
Alabama	Grace	Grace	3	6	20
Alaska	Grace	No Grace	6	6	10
Arizona	No Grace	No Grace	3	4	5
Arkansas	Grace	Grace	3	5	10
California	No Grace	No Grace	2	2–4	5
Colorado	No Grace	No Grace	....	6	6
Connecticut	No Grace	No Grace	6	6	20
Delaware	No Grace	No Grace	3	6	10
District of Columbia	No Grace	No Grace	3	3	12
Florida	No Grace	No Grace	2	5	20
Georgia	No Grace	No Grace	4	6–20	7
Idaho	No Grace	No Grace	4	5	6
Illinois	No Grace	No Grace	5	10	20
Indian Territory	Grace	Grace	3	5	10
Indiana	No Grace	No Grace	6	10	20
Iowa	No Grace	No Grace	5	10	20
Kansas	No Grace	No Grace	3	5	5
Kentucky	No Grace	No Grace	2–5	15	15
Louisiana	No Grace	No Grace	3	5	10
Maine	No Grace	Grace	6	6–20	20
Maryland	No Grace	No Grace	3	3–12	12
Massachusetts	No Grace	Grace	6	6	20
Michigan	No Grace	No Grace	6	6	6–10
Minnesota	No Grace	No Grace	6	6	10
Mississippi	Grace	Grace	3	6	7
Missouri	No Grace	No Grace	5	10	10
Montana	No Grace	No Grace	3	8	10
Nebraska	No Grace	No Grace	4	5	5
Nevada	Grace	No Grace	4	6	6
New Hampshire	No Grace	Grace	6	6	20
New Jersey	No Grace	No Grace	6	6	20
New Mexico	Grace	Grace	4	6	7
New York	No Grace	No Grace	6	6	20
North Carolina	No Grace	Grace	3	3	10
North Dakota	No Grace	No Grace	6	6	10
Ohio	No Grace	No Grace	6	15	5–24
Oklahoma	Grace	Grace	3	5	1–5
Oregon	No Grace	No Grace	6	6	10
Pennsylvania	No Grace	No Grace	6	6	20
Rhode Island	No Grace	Grace	6	6	20
South Carolina	Grace	Grace	6	6	10
South Dakota	Grace	Grace	6	6	20
Tennessee	No Grace	No Grace	6	6	10
Texas	Grace	Grace	2	4	10
Utah	No Grace	No Grace	4	6	8
Vermont	No Grace	No Grace	6	6	8
Virginia	No Grace	No Grace	2–5	5–10	10–20
Washington	No Grace	No Grace	3	6	6
West Virginia	No Grace	No Grace	5	10	10
Wisconsin	No Grace	No Grace	6	6	20
Wyoming	No Grace	No Grace	8	5	5

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INTEREST LAWS.

STATES AND TERRITORIES.	Legal Rate of Interest.	Rate by Contract.	Penalty for Usury
	Per cent.	Per cent.	
Alabama	8	8	All interest forfeited.
Alaska	8	8	All interest forfeited.
Arizona	6	Any rate.	None.
Arkansas	6	10	Principal and interest forfeited.
California	7	Any rate.	None.
Colorado	8	Any rate.	No forfeit except with pawnbrokers.
Connecticut	6	6	None.
Delaware	6	6	Forfeiture of double amount of loan
District of Columbia	6	10	Forfeiture of interest.
Florida	8	10	All interest forfeited.
Georgia	7	8	Excess of lawful rate forfeited.
Idaho	7	12	(a).
Illinois	5	7	Entire interest forfeited.
Indian Territory	6	8	Principal and interest forfeited.
Indiana	6	8	Excess of interest forfeited.
Iowa	6	8	Forfeiture of interest and costs with 10 per cent per year to School Fund.
Kansas	6	10	Excess of interest forfeited.
Kentucky	6	6	
Louisiana	5	8	Interest forfeited.
Maine	6	Any rate.	None.
Maryland	6	6	Excess of interest forfeited.
Massachusetts	6	Any rate.	None.
Michigan	5	7	Interest forfeited.
Minnesota	6	10	Principal and interest forfeited.
Mississippi	6	10	Interest forfeited.
Missouri	6	8	Interest forfeited.
Montana	8	Any rate.	None.
Nebraska	7	10	Interest and costs forfeited.
Nevada	7	Any rate.	None.
New Hampshire	6	6	Three times excess of interest forfeited
New Jersey	6	6	Entire interest and costs forfeited.
New Mexico	6	12	$100 fine and forfeiture of twice the amount.
New York	6	6	Principal and interest forfeited. Contract void.
North Carolina	6	6	Twice amount paid forfeited.
North Dakota	7	12	Entire interest forfeited.
Ohio	6	8	Excess forfeited.
Oklahoma	7	12	Interest forfeited.
Oregon	6	10	Principal and interest forfeited.
Pennsylvania	6	6	Excess of interest forfeited.
Rhode Island	6	Any rate.	None.
South Carolina	7	8	Double the excess forfeited.
South Dakota	7	12	All interest forfeited.
Tennessee	6	6	Excess of interest forfeited.
Texas	6	10	Entire interest forfeited.
Utah	8	Any rate.	None.
Vermont	6	6	Forfeiture of usury.
Virginia	6	6	Interest forfeited.
Washington	6	12	Double illegal interest forfeited.
West Virginia	6	6	Excess of interest forfeited.
Wisconsin	6	10	Entire interest forfeited and treble excess paid recoverable.
Wyoming	8	12	Forfeiture of interest and costs.

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